

Peace as War

Bosnia and Herzegovina, Post-Dayton

Dražen Pehar



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Introduction

This book describes a political condition that is deplorable to those who live in it, but is generally, and to the impartial external observers in particular, still pregnant with important political, ethical, and discourse-theoretical lessons. It is a condition of which today's Bosnia-Herzegovina (BiH) offers a highly illustrative example; hence, my focus in this study is entirely on the 'state,' or entity, or political condition. The most succinct description of the condition is one we find in Michel Foucault's 1976 Collège de France lectures, 'politics is a continuation of war by other means,' his now famous inversion of an even more famous dictum by Carl von Clausewitz (Foucault 2003, 15–19). The description is directly reflected in the title of this book, except that I chose the term 'peace' for two reasons: this gives the title a more enigmatic character; and, second, officially, the condition of today's Bosnia-Herzegovina, from at least 1996 till today, is named as 'the implementation of the Dayton framework for peace,' that is, an implementation of an officially signed, and widely familiar, peace treaty (UN General Assembly 1995).

How can the state of peace be theorized as a continuation of the state of war? In my view, the key fact that the scholar needs to consider is in the discursive nature of postwar, or 'peace-implementing,' politics. Hence, the question we should pose is as follows: What is it in the structure of discourse that explains the ability of a party, or parties, to preserve the state of war even into the postwar period, or more specifically, into the period of an apparent implementation of a peace frame? In other words, we need to explain exactly the nature of the mechanism that retains the warlike attitudes and relationships in the medium of not swords, but words.

The first essay published in this book offers the required explanation: the mechanism concerned is named as ‘dediscoursification,’ that is, a process through which (at least) one party uses discourse in the way that, in the other parties, induces the belief that the use of discourse in tackling the common social and political problems, in partnership with the former, is unlikely to pay off. In the context of the post-Dayton implementation of the peace treaty for Bosnia-Herzegovina, this means that some parties have, through some special mechanisms, managed to produce in the other parties a very pessimistic belief that, first, either the war (1992–1995) continued, or that, second, the war is likely to break out again due to the partner’s inability to partake in the common medium of (morally acceptable) discourse.¹

In my narrative, the Bosnian² domestic parties are important to the extent they provide for the stuff of the conflict in the sense of a long-term incompatibility in ultimate political goals; however, as to the very dynamics, and actual developments, the ‘international community’ is indeed the key engine of the Bosnian both wartime and postwar political landscape. And, by the international community, I mean primarily the US, Russia, Turkey (more recently), and the EU (keep, however, in mind that the latter refers to the most powerful states, to France, Germany, and the UK, with some smaller states playing occasional roles as assistants, or proxies, to the bigger players; for instance, Austria to the US through the high representatives). The key causes of the postwar dynamics in Bosnia-Herzegovina are to be sought in the attitudes by, and relationships within, the international community thus defined.

1 For a wider theoretical framework within which such a mechanism can be situated, please see my book *Dediscoursification: How Discursive Attitudes Cause Wars*, either in the form of excerpts from it published in *TransConflict* (Pehar 2016d) or in its full draft (Pehar 2016c). A brief summary is presented in Pehar (2016b). See also Pehar (2017c).

2 Note that, like many others, I use ‘Bosnia’ and ‘Bosnian’ as abbreviated forms for ‘Bosnia and Herzegovina’ (or, ‘Bosnia-Herzegovina’) and ‘Bosnian and Herzegovinian’ (or, ‘Bosnian-Herzegovinian’), respectively.

In fact, the key cause is in the application of a *'divide ut imperes'* strategy that is perhaps only semi-consciously applied. One Bosnian party (specifically, Bosniak-Muslim³) policy is supported by external, more powerful actors, but not till the very end, or totally and absolutely. The support is withdrawn pretty soon after it has been lent, and then the external parties wait for another, easily exploitable opportunity. Hence, from 1997 on, we see a series of Bosnian crises that, first, do not recede and that, second, but more importantly, remain critical enough to preserve the image, and reality, of Bosnia-Herzegovina as an unsettled, or problematic, or war-torn and nonrecovering, perhaps even irrecoverable, state. Now, very interestingly, keep in mind that, throughout the postwar period, Bosnia is ruled officially by the international community: its main, and the most responsible, governing body is placed in the High Representative, an international official formally appointed by the UN Security Council (but formally proposed by the European Union). As I explain in this book, this means that the High Representative's true role is not one of a peacemaking party; his proper function is to extend the state of war, or the state of emergency, because the body, which is dictatorial, makes sense only as a body endowed with the 'state of emergency powers'; to activate such powers, the body needs not a peaceful, but a warlike, or conflictual environment.

Briefly, the mechanism works as follows: on some specific issues, the US imposes on the Bosnian local parties an arbitrary interpretation of the Dayton peace agreement through the figure of the Bosnian dictator, that is, the High Representative, the only figure who can act arbitrarily, and get away with it, in the Bosnian political landscape; but also have in mind that, occasionally, in relation to

3 Here I don't mean 'party' as a political organization; I mean 'party' as a side to a conflict or a political process; also, keep in mind that the leading Bosniak-Muslim party, Stranka Demokratske Akcije (Party of Democratic Action, SDA), is actually the operative agent in question; I have repeated time and again that the SDA interpretation of Bosniak-Muslim interests is not the only viable, and especially not the most enlightened, or reasonable, one. As to the terminology, the 'Bosniak' (people) is the exact constitutional category. As a majority of Bosniaks are actually Muslim, or feel close to the Muslim countries and peoples, or have Muslim predecessors, I often use the terms 'Bosniak' and 'Bosniak-Muslim' interchangeably.

some divisive and inflammatory issues, the Bosnian-Herzegovinian Constitutional Court (in which a majority can be formed by three international and two Bosniak—or Croat, or Serb—judges) can be, and has been, employed by the US in a fashion similar to the use of the High Representative. The interpretation thus imposed in fact ‘alters’ the Bosnian political-constitutional landscape, contrary to the interest of at least one (Serb), not infrequently even two (Serb and Croat), parties to Bosnian politics, unsettling thus the balance of the original compromise signed at Dayton and breaking the original collective promise as the (two) parties understood it.

In one party, the Bosniak-Muslim, this creates the impression that, one day in a not too distant future, they might see the decisive victory of their policy over the policy of the other, more profederalist, or more pro-independence-minded, parties, that is, the Serb and the Croat. However, in reality, nothing has changed due to the fact that, first, the ‘alteration’ is imposed by an external and non-representative actor,⁴ and second, the incentive to self-limit one’s ambition is removed due to the role of the High Representative as a *deus ex machina*, and, third, also due to the fact that the compromise-based, elementary constitutional skeleton of Bosnia-Herzegovina, as negotiated and agreed at Dayton in November 1995, generally remains at least foundational to the polity: in constitutional terms, the country remains one country coconstituted by three peoples sharing power through a federated, two-entity structure, and one entity remains to

4 Of course, there are a few exceptions to this ‘rule’: for instance, as to the passage of the Bosnian Defense Law and the 2005 creation of a joint BiH armed forces and the dismantling of the existing entity defense ministries (this was not foreseen by the Dayton Constitution), it is clear that RS (Republika Srpska, one of the two entities of which Bosnia-Herzegovina is composed) Parliament with a two-thirds majority supported the alteration (see Smoljanović 2005). However, I consider this as a short-term, opportunistic move caused by a lot of arm-twisting. Second, it is also clear that the political parties’ elite, motivated by the sheer power of political office, seem to be willing to play along with the ‘rules of the game’ as imposed by the international community, e.g., the election laws, some of which I discuss extensively in Chapter 4, but keep using a pro-state of war, or conflictual and heated, rhetoric as soon as the election period appears on the horizon. This is, again, reasonable in light of the thesis of the opportunistic behavior. However, overall, the periods of serious political crises and disagreements that are rarely settled by negotiation and compromise recur in post-Dayton Bosnia every so often.

bear the name of 'Republika Srpska.' This, in brief, is how the international community keeps the Bosnian pot simmering.⁵

An attentive, and reasonable, reader could respond to this as follows: if the condition is as described, why do the local Bosnian parties not rebel; why don't they decide to oppose and, 'by opposing, end it'? Again, the answer is easily given: the parties have different interests, and different, and irreconcilable, definitions of their political goals. Hence, they are unable to agree on the need to move in a single direction; also, to some, the High Representative-run 'state,' or political condition, is somewhat more favorable, or at least more promising, than to the others. The structure is thus preserved by sheer inertia and by a lack of appropriate (i.e., non-zero-sum-oriented) political culture: the (discourse- and compromise-unfriendly, and zero-sum-oriented) culture is inherited from the age of communist rule, making sure that the local parties, including the population at large, simply follow the route determined by the international community and accept willingly the imposed post-Dayton roles as the safest. For the time being, everyone accepts the ab-

5 I borrow the metaphor of 'simmering' from one diplomatic officer who worked for the US embassy to Bosnia-Herzegovina; see also a very clear case of the '*divide ut imperes*' approach to Bosnia-Herzegovina in the UK House of Lords International Relations Committee, 6 September 2017 session (available online: <https://www.youtube.com/watch?v=M62yMBXtowE>). Such an approach was presented at the session in the following sense: General Sir Michael Rose and Lord Paddy Ashdown presented the mutually irreconcilable narratives of the international (war and postwar), or 'great power,' politics in Bosnia. Second, Ashdown, characterizing the situation in Bosnia as 'febrile,' toyed with the image of a start of a new war in Bosnia (a 'Serbian' quasi-terrorist element throws a grenade at a Friday Muslim prayer (Ṣalāh al-Jum'ah) assembly, 'say at Doboј,' Ashdown said). Third, Ashdown also openly and in front of a live camera admitted that, as a High Representative (2002-2006), he went beyond, and abused, his official mandate (to be the guardian of the Dayton Constitution) by supporting the policy of the strengthening/expanding of Bosnian state powers (at the expense of the entities, RS and the BiH Federation; hence this was a pro-Bosniak-Muslim, and anti-Serb or anti-Croat, policy). Fourth, several committee members refer to 'the Serb minority in Bosnia,' which is unconstitutional, and anti-Dayton, and also tacitly pro-Bosniak-Muslim (or at least SDA) policy. Finally, close to the end of the session, even Ashdown gives a hint that, contrary to the wishes of the key UK House of Lords International Relations Committee Bosniak lobbyist (Baroness Arminka Helić), some 'EU nations' could, losing patience, welcome the final disintegration of, i.e., the RS split away from, Bosnia. Ashdown explicitly compares RS president Milorad Dodik with Montenegro prime minister Milo Đukanović, who in 2006 secured independence for Montenegro from Serbia (see 1:34:55 and after in the video mentioned above).

normal 'state'⁶ as a minimally normal environment that still secures the minimum of their politically legitimate interests, despite its being continuously crisis-ridden and conducive to the political warfare.⁷

It goes almost without saying that such relations and attitudes are pathological and pathogenic, especially for the local parties. It is impossible for a sane human being to accept the 'peace as war' condition in the same way as it is impossible for a sane human being to accept 'life' as 'death,' or 'health' poisoned by 'illness,' or 'slavery' as 'freedom,' or 'pleasure' brought about by 'pain'; one needs to be biophobic, or a thanatophile, or a masochist, to be able to accept such perverted conditions. However, keep in mind that here, in the 'peace as war' condition, we deal with a social and discursive relation, meaning that the relation will be sustained if some influential parties find it profitable, and if there is a ready way to produce it discursively. As to the constellation that is indeed favorable to the preservation of such relation/condition, I think I have suitably explicated it in the last two chapters of the book.⁸

In my view, two features of our common intellectual landscape, the undercurrent to our social science and humanities fields, prevent us from recognizing clearly, and debating successfully, the political conditions as exemplified in the case of Bosnia-Herzegovina. First, postmodernist, or poststructuralist, social thought, which is

6 In this 'state,' the key constitutional provisions were imposed by Austrian ambassador Petritsch in April 2002 in the form of constitutional amendments, not agreed as those endorsed originally in November 1995.

7 This is how, in April 2009, following a plethora of international measures, decrees, and interventions including his own, one of the High Representatives, Lord Paddy Ashdown, depicted Bosnia: '[d]ivided, dysfunctional, a black hole ... a space that we cannot afford to leave because it's too destabilizing if we do, but we cannot push forward toward full statehood, either.... That, I think, is the danger' (quoted in Maher 2009).

8 As to the most recent developments, it is clear that the influential circles within the US tend to use the Bosnian internal conflict to lend support to their narrative of a renewed 'Cold War with Russia.' They do so by interpreting the policies and conduct of Republika Srpska as an effect of the Russian meddling or conspiracy, which is simply not true. Actually, the continuing assaults on the entity, in various forms, by the US and parts of the EU explain such policies better than anything else. For a 'bad Russia' narrative, see, for instance, Hamilton (2017) as well as Pehar (2017a), and Erlanger (2018).

nowadays fashionable and widespread, is generally inimical to the moral matrix of discourse, or language; without the latter, the recent developments in Bosnia-Herzegovina cannot be properly theorized for the following reason: the Dayton peace accord is a collective promise, and without believing in an inherent value of a promise (that is *ceteris paribus* binding on us), one will not be inclined to launch a critique of the way the peace deal has been implemented. Also keep in mind that the content of a promise depends on the notion of shared meaning, hence on a shared and well-supported interpretation, of a document. If one is a poststructuralist, one will necessarily form a view of a promise that is, to a too high degree, loose, liberal, and unable to bind the parties concerned,⁹ simply because a poststructuralist views interpretations and meanings as arbitrary plays with arbitrary, or ‘floating,’ signifiers forming potentially infinite chains of a fundamentally unpredictable direction. Second, generally, starting with Max Weber, and due to an excessively empiricist epistemology, political science often refuses to give consideration to the issue of values, or ethical matters with which one’s political acting is frequently interwoven. This, no doubt, discourages a scholar from posing the questions that are focused on morality, in contrast to those focused on power.

As to the ‘technical construction’ of the book, all the chapters published here, except Chapters 2 and 7, offer—in parts considerably—modified versions of the essays published earlier in the journal *TransConflict* over a long period of time (from August 2012 to January 2017, with the majority published in late 2014). Conveniently revised, updated, mutually bridged, and polished, they are here brought together because, together and as ordered in this book, they supply, first, a solid argument against the way one peace deal has been implemented; and, second, also an implicit argument in support of a view that could assist the future parties in successful im-

9 Actually, I think that one is likely to form a view of promise that coincides with the view advocated in Felman (2003).

plementation of the deals, not necessarily or always peacemaking ones, to which they will commit.

Chapter 5 is here published for two especially important reasons: first, I think that, in the chapter, I have managed to contrast my approach to the Dayton agreement with the competing one in crystal-clear terms, and, second, I think that the chapter can serve well to emphasize the point that, as to the debates on Dayton, there are no neutral sides. Scholars rarely play the role of unbiased, or impartial, external observers of such developments and are often actively engaged as partisan to this or that policy, and in many areas and issues serve as nothing more than servants supplying the power holders with theoretical rationalizations of their positions. Hence, as Quentin Skinner repeatedly pointed out, the best way to read and interpret a political theorist, or his or her work, is by relating it to the details of the political context and to the blaze of political battles within which it is produced and employed. However, this does not mean denying that the work can also be assessed in reasonable, universally graspable, and intersubjectively valid, or verifiable, terms.

Importantly, Chapter 5 is an intermediate chapter that divides the book, and my entire argument, in two. The first half is composed of the chapters dealing predominantly with legal documents and issues. Those chapters all have a single aim: to substantiate the thesis that the official/dominant legal reading of the Dayton peace framework is less reasonable than an alternative reading; that is, to prove, beyond reasonable doubt, the proposition that the dominant, or official, reading of the Dayton framework unsettles the peace settlement. The reading transforms a collective promise that was actually made into an imposed promise that was not made; hence, it is only pseudo-legal. This, however, has one key effect: to extend the Bosnian War into the postwar period, to ensure that the politics amounts to a continuation of war by other means, through interpretive manipulation. On these foundations, the second half of the book serves a different, but closely related purpose: to chart the political vision and a cluster of politically powerful narratives,

standing behind the pseudo-legal interpretive process as analyzed and explained in the first half.

This means that, in Part II, I point to the politics that enabled the processes documented in Part I. Chapter 6 explains the key political means the US deployed to keep the Bosnian pot simmering, and through which it aimed to intervene, and keep intervening, in the Bosnian conflict. Chapters 7 and 8 propose a set of political motives, and visions, driving the Americans' projection of their own political power into the post-Dayton landscape of Bosnia-Herzegovina. Both chapters also serve as the key media through which I present my critique of the Dayton peace implementation process. However, an attentive reader will conclude from my chapters rightfully that, in this book, except for the idea of ethnic electoral units as proposed in Chapter 4 and a brief final section of Chapter 2, I hardly offer a remedy. Frankly, I don't think that a sane and reasonable politician should need an explicitly offered remedy in the context of the post-Dayton Bosnian politics. All we need are the relations, attitudes, and procedures that are perhaps too basic or too self-evident to be mentioned in this, or perhaps any other, context: a reasonable interpretation, the capacity to argue coherently, realistically, and open-mindedly, the awareness of a compromise, the commitment to democracy, political plurality, and multiethnicity, the strength to resist the illusion of moral superiority, and the determination to keep one's own promise.

Lastly, one reader of the book manuscript raised an interesting issue of the empirical weight of the key theses I advance here: to what extent is the story I present a real empirical story concerning the actual motivation of the key actors of the politics in, and about, Bosnia? First of all, I need to emphasize that, in this book, my focus is somewhat narrow—here I deal with the issues situated on the borderline between the law and the politics, and pertaining to the several actors' (political-legal) attitude to a chunk of discourse with the status of a 'peace agreement' considered primarily as a collective, or shared, promise. For instance, I do not focus on the other-

wise important issues related to the historiography of the Bosnian War that the International Criminal Tribunal for the former Yugoslavia (ICTY), at The Hague, suggested through their key rulings. All in all, I focus on three key documents including the Bosnian Constitution, and, in terms of scholarship, construct an argument that leans partly on a discourse theory and partly on constitutional hermeneutics. However, I think the documents concerned are of the essential importance, and standing, in Bosnian politics as well as in the international politics about Bosnia. Also, many international actors were involved in the making, and interpretation, of the documents, which in this case means that constitutional hermeneutics cannot be divorced from the international relations study. Hence, in terms of quantity, the material I deal with in this book is indeed of a gigantic proportion, and I am certain that I have not consulted all that was written about the topic. However, as all scholarly work, the thesis I advance here is open to scrutiny, and I think that, in terms of the empirical clarity of its consequences, it falls into the category of the falsifiable narratives, which speaks in its favor.

Second, one major issue that remains is the issue of the ‘actual motivation of the key actors.’ The reader should here be aware that my case for the narrative on the ‘actual motivation’ is built slowly and gradually throughout the book. The answer I deem most plausible is offered only on the last pages of the conclusion. Here I will also immediately emphasize that the issue is actually pretty complex, as perhaps all psychological issues are. Metaphorically speaking, if I ‘accuse’ the key actors of the international community, primarily the US and UK, of helping to preserve the condition of ‘peace as war’ in Bosnia-Herzegovina, do I base my accusation on the thesis of the actors’ malevolence or of their ignorance, i.e., the lack of insight (or, simply, false beliefs)? Prior to giving a brief answer to that question, I must here admit that I do not have a clear chunk of evidence (say, in form of a secret document passed from one branch of the US government to another) confirming unambiguously that the key American actors deliberately preserved the state of war in

Bosnia. To have such an expectation is to be too naïve or too optimistic about scholarship. In other words, all evidence I offer here is circumstantial, which does not imply that I deem it weak.

Returning to the key issue of ‘malevolence vs. ignorance,’ do I here claim that the primary emphasis needs to be placed on, e.g., America’s oft-repeated claim that Bosnia-Herzegovina is primarily a Muslim country, or a country with a Muslim majority, or a country with one outstanding, and always state-friendly or state-foundational, Bosnian-Muslim people (i.e., ‘ignorance’), or on the American ‘need’ to preserve the problematic nature of some entities (Bosnia, as a part of European neighborhood) to make itself indispensable to some entities (to Bosnia, and then indirectly also to the European wing of NATO or EU) (i.e., ‘malevolence,’ or a narrow, self-centered interest that comes at the expense of the other nations’ interests)? My answer to that question is as follows: I do not think that I have to choose one option rather than the other; the options are, in my view, fully compatible as I clearly suggest also in the end-notes to the final section of Chapter 1; hence, I think that the dilemma ‘malevolence or ignorance’ is false—one act can comprise both, and, surely, there is a bit of malevolence in all ignorance, and also the other way around. Regardless of the dilemma, I think that what should really disconcert, or trouble, us is the fact that the effects of the policy, ‘peace corrupted by the continuation of the state of war,’ are as harmful to some peoples as they are, and that those effects, unlike some random side effects, were easily predictable at the policy-making stage.

PART I

Document/Law Reading as Peace Unmaking

Dediscoursification; Or, the Dayton Peace Implementation as a Continuation of the State of War

1.1 Dediscoursification

Over the last few years I have developed a theory of dediscoursification as one of the major causes of armed conflict.¹ The key premise of the theory is aptly characterized by the hero in a Margaret Atwood novel: ‘War is what happens when language fails.’² The theory of dediscoursification explains in detail what exactly happens when language fails, that is, when political actors gradually come to realize that they are unlikely to find a joint solution in the medium of language to their shared problems or political conflict, that their *ens loquens* is likely to be replaced with *ens belli*. The theory aims to elucidate the ways in which something tragically harmful is happening with language when individuals use it in an insufficiently rational and considerate, and most importantly in an insufficiently moral, way.

Hence, when you have at least two actors who hold *prima facie* irreconcilable views of key issues that they consider of critical importance to themselves and their relationship, the two should, and normally will, try to bridge the difference through negotiations, i.e., through the use of language in accordance with some shared, com-

1 See Pehar (2011a, 185-194; 2012d; 2013) and for some early responses, see Matteucci (2012) and Chamberlain (2013). In my previous work I used the word ‘dediscoursation’; following a sensible suggestion by Philip Pettit, the term is now changed to ‘dediscoursification.’

2 *The Robber Bride* (Toronto: McClelland and Stewart, 1993), chap. 6.

monly accepted standards. However, if the two do not use language in accordance with such standards, the phenomenon of dediscoursification will take place, which means that they will cease to believe in the possibility of coming to an agreement within the medium of language, by negotiating. A special kind of silence will descend over such actors, one that indicates not only that the two have no further words to say to one another, but also that one actor started viewing the other as a fundamentally immoral user of language: as one who uses it in such a way that the use demonstrates his or her nonsociability and general impenetrability to the negotiating effort. Typically, one actor starts characterizing the other as a liar, or as a speaker generally disinclined to offer sound and initially plausible arguments, or as incoherent, or often also as a promise breaker. Whenever such a characterization is given, we know nearly for certain that the users of language will be, at worst, inclined to jump at each other's throats, or at best, take up a significant and enduring distance from each other. In other words, even in the best-case scenario, after dediscoursification takes its toll in a social relationship, the relationship ceases to be, that is, the actors are no longer capable of forming a coherent whole, an association.

One of the key theses of the theory of dediscoursification reads as follows: arriving at such a conclusion concerning a discourse of one's (at least potential) partner can be, and often is, fully based on rational grounds. In other words, one who characterizes another actor as a dediscoursifier, as a party who uses language in the way that 'annihilates' language itself, which opens the door to the use of nondiscursive means as a tool of political conflict resolution, can be fully right in two senses: the dediscoursifier violates some intersubjectively valid standards of the use of discourse; and, second, his or her violation reaches the point at which one who qualifies him, or her, as a dediscoursifier cannot escape his own conclusion despite his best intentions. I deem this to be an acceptable idea simply due to the fact that the description of a speaker as a liar, or as a promise breaker, can be both rational and well-founded, and can also be

intersubjectively valid in the sense that all rational users of language are likely to agree with such a description. However, we should also bear in mind that, in some societies, dediscoursification is generated through a cultural pattern; it is promoted through stereotypes triggered in critical moments: for instance, in some societies one who aims to resolve political problems or conflicts by negotiating is valued less than those who respond to the fact of conflict by some violent response: as, for example, those who dare to fight physically for the 'right' that they claim.³ I will put this kind of propagation of dediscoursification aside—I think it is much less interesting than cases in which dediscoursification takes place through a series of experiences with actual partners involved in an actual communicative process.

Dediscoursification is a process triggered by a violation of discursive values that, within human collectivities, have the status of both discursive and moral values: for instance, truth, rational and coherent argumentation, and the fulfillment of promises, without which language obviously would not make sense nor serve as a key means of securing cooperation within a group.⁴ Implementation of such values reminds us of the fact that language is indeed a foundational, or *Ur*-, institution in any community, and that all other institutions depend on that basic one. There is no way for a functional institution to be staffed by liars or by those who often utter contradictions, or by promise breakers. The institutions that are so staffed disintegrate rapidly. The violation of discursive values as also moral ones leads unavoidably to the conclusion of a principled non-sociability of some actors, which then leads to the conclusion that one is, in partnership with such actors, unable to conclude an agreement concerning issues that are of vital importance to a political

3 Also we need to remember that some countries are inclined to characterize themselves as nations 'that in the times of peace lose the gains made in the times of war.' We find such a cultural stereotype in diverse nations, for which see Pehar (2013, 14).

4 More precisely, in Pehar (2016c) I advocate the view that such discursive values can be reduced to four fundamental ones: 'meaning,' 'truth,' 'reason,' and 'promising.'

conflict; this is, as the theory points out, a truly grave and dangerous situation: the other is taken as somebody over which we cannot exert a verbal influence, and as somebody who does not want to exert such influence over us in fair terms. To this the process of dehumanization will soon follow as well simply because human beings define themselves primarily as beings endowed with *logos*, the capacity to engage in reasoned use of discourse. A state of tension (rooted in, for example, insecurity, distrust, uncertainty) then follows—and in such conditions the smallest disturbance is all that is needed to trigger the avalanche of violence.

Obviously, the theory of dediscoursification is set on the premises of discourse ethics. There are many advocates of such an ethical perspective, which is in the contemporary setting normally related to the work of Karl Otto Apel and Jürgen Habermas (Apel 1973; Habermas 1983; Kettner 2006). However, it is important to keep in mind that the tradition of discourse ethics is much older than Apel or Habermas. I personally find some advocates of discourse ethics who are more practice-oriented, and whose standard philosophical or historical presentations do not include, much more inspiring and informative than either Apel or Habermas. These include the classical Greek rhetorician and theorist of language, Isocrates, and his follower from the era of the Second Sophistic (a Greek cultural movement of the second and third century AD), Publius Aelius Aristides, and certainly George Orwell and Hannah Arendt among modern analysts (Orwell 1961; Arendt 1972). In terms of political theory, the theory of dediscoursification leans primarily on two theoretical approaches: first, generally, in the sense of its conceptualization of the state of war, the theory draws on Hobbes and Clausewitz, who both insist that ‘war is a continuation of politics by other means.’ Second, and more specifically, the theory draws on the republican political theory that theorizes the notion of liberty, in light of the master-slave relationship, as a relationship of primarily discursive character, and also as a relationship that involves continuation of the state of war through the period of an apparent peace (typically, a master

treats his slave as the ‘spoils of war’).⁵ Finally, from an epistemological-methodological point of view, the theory of dediscoursification adheres to the principles of methodological individualism—whenever we address the issue of dediscoursifying, we have to address specific individuals as concrete users of language within a specific social-political context.⁶ It is undeniable many people suffer from armed conflict, but we should not forget that, to a large extent, war is an effect of a flawed way in which some individuals use, and relate to, language.

From the angle of empirical relevance of the theory of dediscoursification, I deem it well-grounded and supported by many examples from political history. The frequency with which some political actors assume a metalingual perspective concerning some other actors’ language, in the periods preceding the outbreak of war, is high; in other words, in the periods preceding the start of armed violence, some actors explicitly describe the other actors’ language as fundamentally flawed and irreparable: Egyptian president Nasser in 1968 emphasized that the force of arms is ‘the only language Israel understands’; similar to Nasser, prior to the outbreak of war with Sparta in the fifth century BC, Athenian statesman Pericles concluded that ‘they [Spartans] prefer war to negotiation as a means of settling the issue of complaints [about the Athenian way of interpreting of a clause of the Thirty Year Peace],’ while the British prime minister Chamberlain’s declaration of war against Germany in 1939 contains the following words: ‘The situation in which no word given by Germany’s ruler could be trusted, and no people or country could feel itself safe had become intolerable.’⁷ The theory of dediscoursification is capable of providing a detailed and persuasive explanation of the ways through which the said political actors drew

5 For the principles of republican political theory, see, for example, Pettit (1999) and Bobbio and Viroli (2003).

6 Those who are interested in the perspective of methodological individualism should consult the work of Jon Elster.

7 For the sources, see Pehar (2013, 3).

the conclusions verbalized in the above propositions, and also through which some other political actors drew similar conclusions in similar situations (for instance, Milošević at the time of the collapse of the Rambouillet negotiations, or Frederick Douglass in the aftermath of the notorious *Dred Scott* decision by the US Supreme Court, which was one of the major causes of American Civil War).

To readers from the Balkans, or to those who are keenly interested in political relations within the region, the most interesting question may be put as follows: What role did dediscoursification play in Bosnia and Herzegovina, especially prior to the outbreak of the 1992-1995 armed violence, and perhaps even today?

1.2 Izetbegović and the Dayton peace agreement implementation

At the time I started formulating the theory of dediscoursification Alija Izetbegović seemed to me to be able to serve as a highly pertinent and illustrative example.⁸ There is no doubt that Izetbegović through 1991-1992 acted upon his political interlocutors as a dediscoursifier—he demotivated them in the sense of having produced in them the loss of belief in the possibility of arriving at a negotiated formula or compromise, a long-term solution to problems in Bosnia and Herzegovina (BiH), in communicative partnership with him. Izetbegović's discourse is filled with the examples of violation of all key values of moral-discursive matrix of language: for instance, we find many contradictory statements concerning the essential issues and aspects of BiH politics; the statement on a civil, ethnically unmarked BiH in parallel with the statement on BiH Muslims as a foundational, and even majority, people in BiH who should claim some special rights over the state; or, the expression of the wish to accept the condition of war with the aim of defending Bosnia's full sover-

8 Here, and in the next few paragraphs, I simply draw on Pehar (2011a).

eignty in the sense of an undivided, nonfederated rule; but also the expression of the readiness to arrange the relations within BiH in accordance with both Serb and Croat interests. The ultimate effect of such contradictions is easy to predict: your interlocutor ceases to ascribe some meaningful content to your statements because they cancel each other out, which then generates in your interlocutor the belief that, to you, language is neither an essential nor a binding medium. Furthermore, on a number of occasions Izetbegović indicated that he did not at all subscribe to the view of an inherent power of argumentation, or exchange of reasons as a part of political discourse: he terminated negotiations with the Serb representatives at the most critical point in time (April 1992-December 1992) because, in his view, the distance between negotiating positions implied that there could be no agreement, and also that the negotiating *per se* did not make sense. He has not thought for a second that the offering of political reasons, and a joint assessment of such reasons aiming at a compromise, was the only discourse-friendly strategy in the given conditions, and more importantly, that it was the only strategy that could have prevented the war from erupting.

However, as a dediscoursifier, Izetbegović most clearly acted so upon the others through his treatment of the constitutional-institutional frame that was in force in 1992 (The constitution of the Socialist Republic of BiH prior to the declaration of independence in 1992), and also through his attitude to the agreements he endorsed or signed in February and March 1992 that could have prevented the war. In the former sense Izetbegović of course was not the only culpable party as he was supported by the BiH Croat representatives: their walk toward BiH independence through a referendum was a joint one, and also their violation of the BiH Constitution then in force was shared too. According to the constitution then in force, any alteration of territorial-constitutional status of the Socialist Republic of BiH required the two-thirds majority of the constituent peoples. However, the referendum outcome failed to reach such a majority. This means that, in fact, the BiH independence referen-

dum did not succeed, and, given the results of the referendum, Izetbegović together with the Bosniak and Croat political representatives had no right to declare independence. As they in fact declared it, they violated the constitution then in force, which means that they broke a collective promise that was supposed to be binding on all the peoples and citizens of BiH at the time. Dediscoursification is a predictable effect of such a strategy: one cannot trust the person who violates his or her promises simply because the violation indicates that, to the promise breaker, language is not sufficiently binding; hence the language of all future promises, that all agreements normally involve, is unlikely to be sufficiently binding too, which necessarily has an adverse effect of one's will to negotiate with a promise breaker, given the fact that all negotiations are ultimately about the making of promises.

As to the second aspect of Izetbegović's loose attitude to the agreements he signed, or to which he was implicitly and explicitly committed, this was demonstrated unmistakably through his notorious reneging on two agreements: The Carrington–Cutileiro plan accepted in Lisbon a few days before the referendum, and the agreement on general principles accepted and initialed in Sarajevo in March 1992. Again, Izetbegović acted in his role of a dediscoursifier: he reneged on the promises he made in a very critical situation in which such promises to all carried an utmost significance. To his political adversaries, for instance, the representatives of the Serb people, this could have had only one impact: due to Izetbegović's fundamental unreliability as a negotiator, hence as a user of language, they increasingly accepted that a war was forthcoming, which involved planning for an actual use of armed forces.

Additionally, one can today very successfully defend the view that, while Izetbegović was reneging on the said agreements, the US administration lent him support and made his decision in favor of the war much easier. The administration had spotted an easily swayable actor who, due to his lack of faith in his own, internal political discourse, could be guided in this or that direction, depend-

ing on the prevailing need. However, it is also interesting to note that, by the very end of Dayton negotiations, both American and European mediators remained uncertain as to Izetbegović's readiness to sign the peace agreement (Holbrooke 1999b, 224, 271, 302). Dediscoursifiers act upon all users of language equally as the persons whose language can never be taken, or relied on, with confidence.

Today we are aware of the option Izetbegović ultimately chose at Dayton. He opted for a peace in the sense of a peace treaty that was set on relatively clear premises and signed with a specific understanding—two strong entities, one loose central government, and, of equal importance, the representation of BiH constituent peoples through 'entities' in the following way: the BiH Federation as a shared Bosniak-Croat entity, and Republika Srpska (RS) as an entity to represent primarily the Serb people in BiH (Holbrooke 1999b, 96-97). Additionally, the Dayton Constitution has endowed the entities with the right to establish special parallel relations with the neighboring states in accordance with the division of powers between the entity and the central level of government. Based on this provision, the Republic of Croatia and the BiH Federation had such a special relationship, which was abrogated by Croatia on its road to the EU; a special parallel relations agreement between Republika Srpska and the Republic of Serbia remains in force.

I deem the theory of dediscoursification as an important theoretical frame not only for the purpose of elucidating the dynamics of relationship within the period that precedes the outbreak of armed conflict; the theory is of a sufficient strength and relevance to be applied to the periods that seem to be the periods of a post-war political peace. Hence, here we should immediately pose an interesting question: Is the process of the implementation of the Dayton framework for peace one of rediscoursifying, or is it perhaps of such a character that it too can be couched in terms of dediscoursification? In other words, assuming that the framework for peace embodies a collective promise, which implies primarily the commit-

ment to be guided and bound by one's own words under their agreed meanings, and also the capacity of rational argumentation in the condition of an interpretive conflict, are we in position today to claim reasonably that, thus far, the promise was fulfilled to a sufficient extent? Or, have some actors, by violating their own promise and thereby dediscoursifying their political partners, in fact showed the will to initiate a new round of armed conflict? In other words, have some actors, by relating to the language of the peace agreement in a harmful and discourse-unfriendly way, diminished in the others the will to resolve further political issues by negotiating, and thereby produced in the others both the kind of silence and the sense of dehumanization that, under suitable conditions, inescapably lead to an outbreak of armed violence?

There is no doubt that Alija Izetbegović considered the period of the post-Dayton peace as a continuation of the armed conflict by other means. To him the peace agreement meant but a frame that ought to be used as a tool to continue the war by verbal means including both legal and diplomatic media. This can be documented easily by his public statements. One of his key theses concerning the Dayton Constitution reads that the constitution contains 'an inaudible, but dangerous war of provisions'; this means that, as Izetbegović views it, war fought through one medium is simply replaced with war waged through a different medium. One group of provisions leads one in one direction, as e.g., Bosniak-Muslim armed forces did during the war, and another group of provisions leads someone else in a different direction, e.g., as happened to the Serb armed forces (Izetbegović 1998, 192). The directions are opposed and irreconcilable; hence, the only important question for Izetbegović may be put as follows: Which group of provisions is likely to prevail at the expense of the other?

What we need to emphasize here emphatically is the peculiarity of such a view: it is a strange and disturbing kind of legal-political hermeneutics within the confines of which the state of war cannot be distinguished from the state of peace. Language is not a

medium that serves to stabilize relations or to contribute to an actual conflict resolution by, say, a compromise. It is a destabilizing factor, a medium in which the war continues, and which prevents arrival at a shared position or a definition of compromise. Such an image of language affects one's view of a peace agreement in the sense that it undermines or blocks two factors without which an actual peace implementation process cannot be envisaged: first, the factor of legal interpretation as a rational process that, on the premise of the agreement taken in its entirety, establishes the most solid and persuasive reasons in support of an interpretation that could be binding on all; second, the factor of a meaningful compromise that can effectively determine the contents of a collective promise to which the parties could effectively adhere—in Izetbegović's view, there are only particular or individual perceptions of such a promise that generate a conflict over the meaning of the promise, and that therefore effectively undermine the notion of 'a commitment to the compromise.'

Had Izetbegović's musings remained in the realm of theory, no serious political consequence would have followed; however, Izetbegović has also made his views operative in the sense of a demand with legal force and effect. Some serious political effects have then taken place of which the political destabilization of the BiH state, which marks the period from year 2000 till today, is the most disturbing. How has such post-Dayton destabilization of relations been effected?

First of all, we need to keep in mind an important fact: in early 1994 Izetbegović accepted the Washington agreement on the BiH Federation with a specific understanding in mind—the BiH Federation is an entity constituted jointly by two constituent peoples, BiH Croats and BiH Bosniaks/Muslims. The Agreement clearly stipulated that the founding parties to the entity do not represent a majority of the Bosnian Serb population (Washington Agreement 1994). As a part of the Washington Agreement, the Bosnian Croat and the Bosnian Bosniak-Muslim representatives adopted a BiH Federation

Constitution outline, which clearly states that the peoples' representatives, and signatories, view the entity as founded by the will of the two constituent peoples who decided to transform the constitutional structure of the Federation territories (Constitution of the Federation of Bosnia and Herzegovina 1994).

Izetbegović's attitude remained, of course, unchanged on the day he signed the Dayton framework for peace. One can undoubtedly recognize such an understanding in the structure of the Dayton Constitution of BiH:⁹ the fact of the separate entity-based constitutionality of the constituent peoples of BiH, of Croats and Bosniaks within the Federation, and Serbs in RS, is translated into the adequate institutional forms. For instance, two members of the BiH Presidency ('Croat' and 'Bosniak') are elected from the territory of the Federation, whereas one member ('Serb') from the territory of RS. The method of electing representatives to the BiH House of Peoples is of the same, entity-based nature. Additionally, the fact of the separate entity-based constitutionality is a source of the rationale for the right of the establishment of special parallel relations between the entities and the neighboring states (Constitution of Bosnia and Herzegovina 1995).

However, in 1998 Izetbegović's view moved in the opposite direction. He submitted an appeal to the BiH Constitutional Court that contains a request to put out of force the provisions that he signed in the period from 1994 to 1995. By carefully reading his appeal, one can quickly and unmistakably realize that Izetbegović now aimed at a devaluation of the key provisions of the Dayton Constitution: for instance, the provision on the constitutionality of the peoples as entity-mediated; the provision on parallel special relations between the entities and the neighboring states; the provision on the powers of the entities in the area of the civilian command authority over the armed forces; and even the provision on official languages to be

9 And also in the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, which is analyzed in more detail in Chapter 2.

used by the constituent peoples within the entities (BiH Constitutional Court 2000). Izetbegović founded his appeal on a simple idea: the preambular provision on the BiH constituent peoples needs to be interpreted as implying the equal constitutionality throughout BiH territory, which implies the transformation of BiH entities into multiethnic units. Of course, the appeal is a kind of a symbolic projection, or a piece of symbolic struggle—Izetbegović is fully aware of the fact that the Bosniak and Croat population of RS, and the Serb population of the BiH Federation, is significantly reduced in size, which implies that the actual consumption of the right of constitutionality (throughout BiH territory) is bound to be of a very limited, actually negligible, character.

Izetbegović's reasoning could have been then, as it could be now, easily defeated on the basis of the text of the Dayton Constitution as it was initially, originally understood and signed in the course of the Dayton negotiations. All the peoples of BiH are indeed equally constituent throughout BiH, but 'BiH' under Dayton means only a certain level of power; additionally, all the peoples indeed implement their status of the constituent peoples throughout BiH, but such implementation takes place through some explicitly defined institutions and in the areas of the government that the Dayton Constitution explicitly refers to. Primary constitutionality of the peoples pertains to them through the entities simply because the representatives of specific peoples, as peoples, have constituted some specific units of BiH as a federal constitutional arrangement, but the three peoples have not jointly constituted both units. The Serb people representatives, as Izetbegović already emphasized, have not constituted the BiH Federation, hence their primary constitution-making role cannot be implemented through the bodies of the BiH Federation. Constituent peoples have given their explicit consent to the establishment of specific entities, but then secondarily, also to the establishment of BiH as a central level of government in accordance with the list of powers of the state, which is again entity-mediated in the sense that it preserves the fact of the

representation of the entities at the central level—the fact that BiH is a federation makes such arrangements easy to understand.¹⁰

Altogether, this means that Izetbegović again acts as a discouraging agent in the period after adoption of the Dayton peace package, both through his public political actions and through his appeal to the BiH Constitutional Court. He in fact conveys the following message: ‘The language of the peace agreement is binding on me, but not in the sense in which it is binding on the other actors. My promise is understood by me in my own way; if the others have taken the promise to mean something else, this is their own problem. My only commitment is to achieve through the language of the peace agreement those goals that I set as my own prior to, and during, the war. I do not discuss such issues with my political adversaries; I simply fight for such goals, this time through the appeal to the BiH Constitutional Court.’

The long-term effects of such a view had not yet been clearly recognized. Izetbegović’s appeal has produced a symbolic revolution in BiH, not in a positive sense of the word, and has undermined the very fundamentals of the post-Dayton BiH. The appeal has in fact clearly signaled that one key party to the peace treaty in fact reneged on the compromise. The party has transformed the compromise-related elements of the treaty into a means to recover and resume the process of implementing its wartime aims. In a theoretical sense, this is an extremely important phenomenon; the phenomenon clearly indicates that the state of peace to a large extent depends on an actor’s attitude to language: if the actor did not endorse some standards of discourse, some discursive values, as a part of his or her political communication or an effort to act upon his or her political partners and interlocutors (which involves primarily the standard of promise fulfillment under a prior joint understanding of the promise, or under an understanding that is jointly determined through the most persuasive reasons of interpretation), then

10 See Chapters 2 and 3.

alienation, a cessation of communication, and consequent destabilization of relations are normal and predictable effects.

However, one should not dismiss an important fact. In his dediscoursifying Izetbegović does not act alone. In fact the strongest actors of the international community lend their support to Izetbegović's movement toward the dissolution of a sophisticated Dayton compromise. How, and more importantly, why was such support given, and what are its actual consequences?

1.3 'International community'

How did the key actors of the international community take part in Izetbegović's project of dediscoursification in the course of an apparent implementation of the Dayton peace plan? Most importantly, on 1 July 2000 the BiH Constitutional Court responded positively to Izetbegović's appeal. In this regard, one should have two crucial things in mind: the Constitutional Court did not accept all the parts of Izetbegović's appeal, but it accepted the key one, to change the definition of the entities into multiethnic units and to divorce the concept of 'constituent peoples' from the two-entity Dayton structure, which immediately implied the demand that some key provisions of the entity constitutions be annulled.¹¹ Second, a majority of the Constitutional Court supported Izetbegović's appeal, but it was a narrow one: the Constitutional Court vote was along the lines of ethnic separation; the two Bosniak-Muslim judges voted for it, the four Croat and Serb voted against it, while the balance was tilted in favor of Izetbegović's appeal thanks to the vote of the three international judges who sided with the Bosniak ones in this matter. Here, in a small arena, we see a continuation of the war by other means, we see ethnic polarization, and we see a victory that was imposed by a foreign quasi-mediator/arbitrator. Most importantly,

11 For more extensive discussion of the Constitutional Court decision (U 5/98-III), see Chapter 3.

we see the absurdity of the post-Dayton Bosnia in which a foreign factor secures the dominance of a minority policy over the majority of two constituent peoples, thus obviously promoting an imperial/colonial ‘*divide ut imperes*’ strategy.

What explains the attitude of these international ‘jurists’ who have in this case simply acted as an extended hand of some influential international actors, the US and the UK primarily? It is not difficult to propose an answer to such a question; the international actors, including the US primarily, did not take the Dayton compromise seriously either. They took it simply as a pretext to continue the war in BiH by other means. In addition to the actions of the Bosnian post-Dayton dictator, that is, the High Representative, whose very actions generated dediscoursification,¹² the key factors in this regard are to be found in the views of some key international actors who have either openly and directly supported Izetbegović or endorsed a view of the Dayton peace agreement that indirectly supported Izetbegović’s symbolic undermining of the agreement’s fundamental structure.

For instance, when, in parallel to the July 2000 ruling by the BiH Constitutional Court, the chief architect of Dayton openly stated that the recognition of Republika Srpska, under such a name, was a mistake, or ‘our [American] flaw,’¹³ one can immediately sense that the affair meant or involved a kind of collusion, or connection. Here I will remind the reader of the facts that elucidate such collusion in unambiguous terms. In order to place such facts within a single conceptual frame, first I refer to a brief paragraph from an article by James Adams that was published in *TransConflict* and also a forum of an American NGO Building Peace:

According to diplomats I interviewed in Bosnia the current highly dysfunctional and discriminatory ethno-political constitution

12 For more on the role and impact of the institution of the High Representative, see Chapter 6.

13 In fact, Holbrooke stated this explicitly (1999b, 363) and the statement was repeated time and again—for instance, in Holbrooke (2003, 3).

and governmental structure, as instituted by the Dayton Accords to stop the war, was assumed at the time to be transitional by the original international negotiators. However, it was not officially designated as such due to a compromise with Serbian hardliners who preferred the Dayton-sanctioned post-war territorial status quo and segregated political arrangements. Therefore, no plan or timeline was set in place to officially facilitate a transitional process to a viable non-ethnic based constitution and governance structure. The Dayton ethno-political constitution defaulted to expedited fear-based ethno-political elections that only served to entrench hardline obstructionists in power and institutionalize structural violence. (Adams 2014)

What does this paragraph actually tell us? First of all, it embodies a perspective on the Dayton accords that is fully in harmony with the Bosniak-Muslim political elite, including Alija Izetbegović. Such a perspective cannot be discerned in the words of the Russian Federation representatives, or of many other representatives of the EU nations, and especially it cannot be discerned in the words of the RS representatives. Second, the paragraph single-handedly projects the key problem in one party to BiH—in other words, it defines RS itself as a problem, not as a constitutional category or as a part of the structure that defined a compromise and thus brought the armed conflict in BiH to a close. Third, the paragraph in fact nearly explicitly claims that the key mediators or international actors (keep in mind that, within this context, we deal primarily with the US representatives and diplomats) did not take seriously the Dayton Constitution for BiH.

They took it as something that is about to be dissolved soon. Additionally, this means that the constitution currently in force is nearly explicitly designated as a means of deception of the ‘Serb hardliners.’ The constitution was envisaged as something that should have motivated such hardliners to a form of cooperation, but it was meant to play only a transitional role. Adams fails to explain how

such a motivation could endure through the period of a radical alteration of the constitutional frame, and personally I am inclined to treat this part of the story simply as an expression of a surreal American optimism.

Fourth, and finally, we need to notice that such a characterization of the Dayton agreement imposes on one a very uncomfortable intellectual dilemma: the designation of a peace frame as transient and temporary implies some perspective on a frame that should replace the current one; however, such a perspective ought to be sufficiently realistic in the sense that it should be sufficiently supported and deemed legitimate by the key local actors of BiH politics. The dilemma is in the fact that the latter criterion contradicts the very designation of a peace frame as transitional and temporary. Additionally, if one designates a peace frame as transient just like that, and if one enjoys the status of a superpower and also of one of the chief sponsors of the frame, then it is very likely that all the local parties to the frame will understand this as a signal that they need not adhere to the provisions of the peace, or that they could view the peace frame as but a short-lived mirage. Here is where one enters the field of dediscoursifying again, i.e., where one becomes a dediscoursifying agent.

Within the global conceptual frame thus explained, a large number of statements by some key planners and implementers of the US policy in Bosnia can be understood without effort at all. Similarly to Izetbegović, James O'Brien, a chief US legal advisor at the time of drafting of the Dayton Constitution, frames the constitution in terms of 'a war of provisions': he names one group of provisions as 'backward-looking,' hence regressive, and another group as 'forward-looking,' hence progressive and preferable provisions (Kostić 2011, 109-112). That is why the implementation of the Dayton peace can be framed simply as a process of putting some provisions out of force, or of diminishing their legal strength and impact, which unfortunately also implies undermining a compromise. In addition, O'Brien openly admits that, within the process of the Dayton imple-

mentation, the vagueness and ambiguity of some provisions was amply exploited by the international actors (O'Brien 2010, 348). Former chief US mediator for the BiH Federation Daniel Serwer, in a private communication, conveyed to me that he tended to characterize the Dayton Constitution in the same fashion as Izetbegović, as an assembly of contradictory stipulations.¹⁴

Furthermore, at least three High Representatives, Ashdown, Petritsch, and Inzko, issued some key statements that can be elucidated only through the aforementioned conceptual frame: Ashdown stated that his job as a High Representative was to 'gradually dismantle the Dayton structures' in order to create the 'efficient state institutions' (Ashdown 2009). In other words, one High Representative openly tells us that, in the style of the American foreign policy and Izetbegović's attitude to the Dayton Constitution, he in fact undermined the Dayton agreement and treated it as a pretext to create something that the parties to the agreement have not jointly sanctioned in late 1995.¹⁵ That is why Ashdown, after setting in place the BiH armed forces and a defense ministry, moved the process of undermining of the Dayton accords in the direction of the establishment of 'BiH police force' (which is not foreseen by the Dayton Constitution), but was, fortunately, countered and stopped at least temporarily. Austrian Ambassador Petritsch was one who, through his April 2002 amendments (signed suitably as he was departing from BiH), transformed the BiH Constitutional Court decision of July 2000 into the institutional reality of the BiH entities (of

14 See also the special report written by Western and Serwer (2000) for USIP, which is filled with suggestions to US diplomacy to implement the Dayton treaty by 'going beyond Dayton.' The Bosnian entities that are the categories of the Dayton Constitution are designated in the report as 'versions of the warring parties,' hence, as something that should be at least weakened, if not fully eliminated. Here is the clearly anticonstitutional advice the report gives on Republika Srpska: 'Weakening the entities, which are institutionalized versions of former warring parties, is feasible. Eliminating the entities—as some have proposed—is an appealing proposition to those who want to see Bosnia and Herzegovina more fully integrated. But the necessary political will can only be generated if the Republika Srpska continues to resist Dayton implementation' (Western and Serwer 2000, 6).

15 See also his presentation at the UK House of Lords International Relations Committee (6 September 2017, available online: <https://www.youtube.com/watch?v=M62yMBXtowE>).

course, one needs to keep in mind that his amendments provide only one of several possible interpretations of the decision), and thus set the institutional conditions for the process of unconstituting the BiH Croats. We also need to not forget Petritsch's frequent characterization of the Dayton Constitution as a 'straitjacket for BiH peoples and citizens.'¹⁶

More recently, in April 2011 another Austrian High Representative, Inzko, issued a famous statement to the effect that BiH needs to be preserved in order to avoid 'posthumous award-giving to Milošević and Karadžić.' Again, we see a High Representative who attributed the key problems of BiH to the Serb party, to the Serb 'aggressors and rapists of Bosnia,' which fully coincides with Izetbegović's wartime and postwar policies. Finally, American vice president Biden, in his May 2009 speech before the BiH Parliament, indicated that, when it comes to the Dayton peace accords, he was interested in two basic things only: 'We [the US] are your project'; this means that the ultimate goal of BiH politics has been pre-defined—BiH politics need simply to follow the American leadership as determined by the US alone; second, as Biden emphasized, 'today's majority may tomorrow become a minority'—this clearly indicates that Biden was not at all concerned with the notion of constituent peoples, and, more importantly, was taking the basic constitutional constraints of Dayton not as really constraining or binding on the parties, but as relative and fluid elements that may soon change their position or weight within a loose constitutional frame.

In summary then, one can clearly recognize the fact that the key actors of the 'international community' buttressed Izetbegović's post-Dayton actions, or perhaps, more precisely, treated Izetbegović as a medium through which the constitutional constraints of the

16 It is interesting to note that, in 2001, Petritsch applied the Marxist doctrine of 'the withering away of the state' to the process of gradual disempowerment of the High Representative, for which see Kostić (2013, 38n16); this demonstrates complete political ignorance of the person who at the time played the dominant role in BiH politics (or, perhaps Petritsch was being deliberately ironic?).

Dayton peace framework could be loosened to pave a road toward a post-Dayton era in which ‘ethno-politics’ will cease to matter. Their own, and Izetbegović’s, attitude to the Dayton framework are indistinguishable: they both consider the framework as a fig leaf to impose an arbitrary interpretation (sanctioned by the figure of the High Representative), or, euphemistically speaking, a creative revision, which, from the perspective of the two constituent peoples of BiH, amounts simply to a violation of a collective promise.¹⁷ Again, a predictable effect has followed: the key actors of BiH politics are faced with the process of dediscoursification, of gradual suppression of the belief in the role and significance of language in international, or intergroup, relations, which is bound to lead to an increased readiness to tackle political conflicts and problems by nondiscursive means.

This means that, nearly twenty years after the adoption of the Dayton agreement, the political situation in BiH is essentially similar to one in early 1992; again, language is marked as a factor that makes no difference in politics; again, the key institutional frame is made practically meaningless; again, the key actors sense mutual alienation due to the loss of trust produced by a noncommittal attitude to one’s own word, and to language in general. The situation is strikingly similar to the situation Cicero accounted in his famous passage from *De Officiis*: Spartan king Cleomenes signed a truce with his neighbors that should have lasted for thirty days (*triginta dierum*); however, a few days later he started raiding the fields of his neighbors, but did so over night—Cleomenes ‘justified’ his misdeed by emphasizing that the truce refers to days, not nights. Cicero brings forward this example as an illustration of an important legal saying: *summum ius summa iniuria*, i.e., ‘a maximally stretched law involves a maximal injustice’; and adds that such overstretching of law is performed through a *malitiosa interpretatio iuris*,

17 Woehrel (2013, 3) correctly notes that, overall, the post-Dayton constitutional intervention by the international community was supported only by the Bosniak-Muslim political parties. I further discuss Woehrel in Chapter 8.

a malicious legal interpretation.¹⁸ Within the context of the political relations in the post-Dayton BiH, a series of pertinent questions may be put as follows: How far has such an overstretching of the law gone on in BiH? What exactly motivated it? And, can this condition be amended?

Conclusion

The first of the questions can be answered easily. The overstretching of the law in BiH has not yet reached a maximum degree. Also, it is unrealistic to expect that the legal overstretching through a malicious and imposed legal interpretation can be further continued. For instance, it is nearly impossible to envisage a situation in which one takes one more step in the direction of a further unconstituting of BiH Serbs through a direct assault on RS by legal and diplomatic means (for instance, by demanding that the name 'Republika Srpska' be modified through a removal of its ethnic attribute). Hence, and especially judging from some recent statements by relevant commentators, analysts, and even actors, it seems that the continuation of war in BiH by nonviolent means has come to an impasse.¹⁹ However, interestingly and importantly, nobody seems

18 See Cicero (1921, 133); it is important to keep in mind that Cleomenes can be presented as one of the first practitioners of 'postmodernist philosophy' in the area of practical hermeneutics of peace agreements. The postmodernist philosophy views meanings as fluid, unstable and open to a never-ending process of interpretation, and it also teaches that there is no truth, but only different perspectives, and that, due to what postmodernists present as the principal incommensurability of criteria, the strength of competing reasons can never be fully determined. I view postmodernism simply as an assembly of incoherent and self-defeating propositions; however, one needs to keep in mind that the intellectual trend has exerted enormous (and harmful) influence over many areas of contemporary theory, both social and political. For an eloquent critique of postmodernism, with which I to a large extent agree, see Gellner (1992).

19 This sentence was written, and published, in 2014; unfortunately, the verbal/political war by other means has continued since then. Hence, today, in December 2017, it is clear that, first, the Bosniak-Muslim assault on 'Republika Srpska' (recently in the form of an attack on '9 January' as the 'RS National Holiday,' on which see Pehar (2017d)) continued in a form supported by the majority of BiH Constitutional Court, and also by the US and EU, with the Russian Federation opposing the assault internationally. As to the Federation, one development is very visible: the leading Croat party struggles with the leading Bosniak-Muslim party over the issue of

to be satisfied with the degree of change actually effected. Actually, it seems that many actors are less satisfied today than in 1996 or 1997, which seems somewhat bizarre.

As to the issue of motivation, which is actually the key question, I do not think that I am able to give an unequivocal and straightforward response. What has actually motivated the key players, such as the US and the UK, and a part of the EU, to disturb the subtle compromise reached in Dayton, and to side with one party to the BiH political conflict? What has motivated the former to thus produce great expectations in the latter, and also to discourage and alienate the other parties in BiH both from the peace process and the BiH constitutional frame as actually implemented? In other words, why engage in dediscoursification when it is least needed? Some hypothetical answers can be formulated, but I am not certain about the specific weight of each of the factors to which I will now point.

First, it is possible that the US presents itself primarily as a protector of Bosniak-Muslims because such an image enables the US to neutralize the bad image of America as an 'anti-Muslim force' elsewhere (Iraq, Syria, Libya, Israel-Palestine, Iran, etc.).²⁰ Second, it is possible that the foreign actors intend to preserve BiH in the state of a mid-level, but nonarmed conflict, which enables them to intervene as they wish and, more importantly, test their mutual relations on a mini-model. Third, it is possible that the complication and destabilization of the relations in BiH is motivated simply by a neocolonialist sympathy for dramatization: once you decide to assume the status of a neocolonizer in a country, which the international com-

the BiH election law (for a more elaborate explanation, see Chapter 4), while the international community stands aside as, more or less, a neutral observer. Currently, it seems that, due to the numerical might, the issue is more likely to be resolved to the liking of the Bosniak-Muslim policy than to the liking of the Croat policy. Also, in their December 2016 decision (on the election law issue), the BiH Constitutional Court seem to have deviated somewhat from their reasoning advocated in the U 5/98-III decision of 1 July 2000, on which the international community founded its post-2000 constitutional reconstruction of the Dayton brought about primarily, but not exclusively, by the High Representative's interventions.

20 This factor is further clarified and elaborated on in Chapter 7.

munity did through the figure of the High Representative, you cannot simply say to the local actors as follows: 'Guys, here is the peace agreement (see UN General Assembly 1995). You simply read and implement it. Should you disagree on some detail, you need to negotiate and continue negotiating until you reach an agreement.' As a neocolonizer, you need some kind of drama and internal tension in your 'colonial house' to create the impression that there is something worth fighting for. For instance, you fight for the ideal of multiethnicity, or the ideal of punishing the aggressor, or the ideal of correcting the injustice caused by the war, or the ideal of overcoming 'backward ethno-politics,' or something similar.²¹

Fourth, it is quite possible that the colonizers got carried away in their business of 'state making.' As the entities connote some division and separation, the 'state making' should connote reintegration and the overcoming of divisions, and thus also the weakening of the entities. Some 'naïve' international mediators/supervisors have perhaps thought that the 'state making,' which in the context of Dayton actually means 'the expansion of the central powers of the government,' can be presented as universally acceptable and as bringing order into a complex community, which ought to be accepted by all. Why should not the local peoples cooperate at the state level, and, once they do so, why should they need the entities? In other words, here we see a naïve kind of motivation—we envisage a foreign mediator as a peacemaker with the role of the state-maker who is confident about his role regardless of the responses such a role produces locally, within the ethnic communities of BiH.²²

Fifth, one should not forget about the financial motivation and the influence of very local factors. First, the international officials in BiH are well paid, and for this one needs to create the impression

21 For instance, Wheeler (2002, 5), then Head of the Bosnian Office of the International Crisis Group, claimed as follows: 'A majority of foreigners in BiH are potential pessimists. They do not have a lot of understanding, or knowledge, of the history of Balkans, its culture and customs. Their life and work here remind one mainly of colonisers.'

22 The reader should note that this factor is fully compatible with the first.

that one has indeed been very busy, that is, engaged in matters that are of critical importance for BiH. For such a purpose, what can be better than the impression that BiH is still beset by a war over the key political issues? One should, for instance, keep in mind that, for the year 2013/14, which was a very low point in terms of international engagement, and payment, in BiH, the OHR budget amounted to over €7 million, with the EU providing more than a half of the amount. That money, however, is simply paying the salaries of the international officials and their local assistants, but is then also spent by the local actors including the local landlords, hotel owners, etc. Additionally, the state which is every so often endangered by a serious political conflict tends to get poorer every day, which, however, improves the chance of foreign investors or buyers to buy some sectors of the impoverished economy at a lower price. Now, as to the influence of the local factors and elites, keep in mind that the institutions of the international community are mainly located in Sarajevo; hence it is much easier for the advocates of the Bosniak prounitarian politics, or for some kind of an anti-Dayton and anti-ethnic intellectual elite, than for the intellectual elite in Mostar or Banja Luka, to influence those institutions.²³

Whatever one's response to the issue of motivation, one thing is strikingly clear: BiH politics in the post-Dayton period is to a large extent the politics of a continuation of war by other means, and, for such a continuation, the international actors are indeed chiefly responsible. The politics looks like a perfect embodiment of Foucault's observation that, in certain contexts, one needs to invert the famous dictum by Clausewitz to the effect that 'war is a continuation of politics by other means.' We saw that, in this regard, the international representatives exploited Izetbegović's generally nonbinding attitude to language and also to a peace agreement in particular.

It is again advisable to emphasize both Izetbegović's and O'Brien's characterization of the Dayton Constitution as a contradiction writ

23 This factor as well is fully compatible with the fourth and the first.

large: in a purely discursive sense, such a characterization has two key effects—first, it implies that the Dayton Constitution is binding neither on Izetbegović nor on O’Brien since a contradiction can bind no one; second, such a characterization makes the job of ‘constitutional interpretation’ extremely easy, but also unavoidably irrational. The job is bound to be irrational since a contradictory proposition entails all propositions and no proposition at the same time, and the job is made extremely easy because, to Izetbegović and O’Brien, it can be reduced to an arbitrary selection of a single proposition from the contradictory pair. Conveniently for Izetbegović and O’Brien, it is a proposition that reflects the interests of Izetbegović (and O’Brien), but excludes the interests of the other parties. However, one also needs to have firmly in mind that the proposition coincides with Izetbegović’s key wartime aim, to achieve a fully sovereign and indivisible BiH in which the individual, not collective, rights play the key constitutional role. Hence, it is clear that such a constitutional hermeneutics, supported also by BiH High Representatives, in fact reproduces the state of war within the medium of an apparent implementation of the Dayton framework for peace.

Lastly, can the situation be amended? Is it possible to secure a transition from a discourse-unfriendly politics (1991–2014) to a politics that respects discursive values and demonstrates a higher degree of civilization by, for instance, the fulfillment of the promise in the way satisfactory to all the parties who jointly gave it? In principle, the answer to this question is affirmative. However, one should not forget that, in the meantime, in the course of the Dayton implementation thus far, some damage was inflicted, and that one should repair the damage to create a stable basis for the politics of redisoursification. Besides, some actors ought to assume responsibility for such damage which, in our case, cannot be attributed solely to the ‘hard-liners’ or the ‘ethno-political elite,’ or whatever name one chooses for those local or international ‘baddies.’

Reasoning in such a direction, BiH actually needs a much deeper change than one that could be effected by a new constitution. I

am also very uncertain as to the following issue: Is there still in BiH a minimum amount of trust required for the implementation of any constitution? Therefore, for now, perhaps we should all welcome the possibility of rewinding time back to late 1995, to moment of the original Dayton formula, with the international community promising that, in the future, no High Representative would ‘come to help’ BiH (as happened in late 1997). However, this kind of scenario is of a low likelihood despite its fairness and a maximum benefit to BiH. It is much more likely that we will continue to vegetate politically in the state of the post-Dayton war, in a fluid and to all an uncertain context, which to a large extent simply reflects both the character of the premodern communities and the immoral *Realpolitik* of the major powers. Actual profit, which in the postmodern world is the only value that matters, must have already been distributed among the privileged actors. The post-Dayton war in BiH, in this perspective, serves as a useful veil that protects those actors from both public scrutiny and an annoying interference by the bodies of the state.

UN GA S/1995/1021: A 'Backward-Looking' Treaty?

This chapter deals with an unfairly neglected document, the 'Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina,' signed at Dayton on November 10 1995. The first two post-introductory parts reproduce the key provisions and the character of the agreement, and draw the agreement's key implications. The third part aims to problematize the process of implementing of the Dayton framework for peace in light of the agreement on implementing the Federation. Finally, the fourth part issues a number of recommendations at several levels as a part of an attempt to clarify the ways in which the situation in Bosnia-Herzegovina could be amended. The key thesis here reads that the Dayton framework for peace has been implemented in a wrong way, and that the Croats, as a constituent people to both the Federation and BiH, have suffered a major part of legal-political harm through the process of implementation. This, however, has also significantly reduced the potential of BiH to figure truly as a multiethnic democracy.

Introduction

The Dayton peace talks for Bosnia-Herzegovina produced two key documents: one of the two assumed a central place in the mind of the public, the diplomats and international representatives as well as the local implementers of the Dayton framework for peace (UN General Assembly 1995). However, the other is talked about much

less frequently and with a much lower degree of consideration and respect. The latter was the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina (DAIF) and was signed on 10 November 1995 at Dayton, as well. In this essay I explain the contents of the agreement, its key implications and also the reasons for its removal from public space or consideration. Obviously, in the long, 20-year period of implementing Dayton, some actors were reluctant to give a higher amount of consideration to the document which is, however, in its importance and weight complementary to the Dayton framework for peace.

The official UN designation of DAIF is ‘UN General Assembly A/50/810-S/1995/1021,’ with the last three elements (S/1995/1021) used more often, for instance when the UN Security Council refers to the agreement. Hence, it is an agreement that forms a part of the international law to the same degree as the Dayton framework for peace. Many Security Council resolutions on Bosnia refer to DAIF and express the council’s formal commitment and support to the provisions of the agreement: for instance, Resolution 1031 (1995), Resolution 1088 (1996), Resolution 1423 (2002), Resolution 1722 (2006), Resolution 1845 (2008), Resolution 2074 (2012) and Resolution 2123 (2013).

2.1 Fundamental provisions and the character of the agreement

Let us remind ourselves of the basic facts about DAIF. This agreement was drafted and adopted in a specific political context: namely, the Federation of BiH was, as widely known, formed through the Washington agreement and prior to the formation of the Dayton Bosnia-Herzegovina (BiH). At Dayton the key driving problem of the negotiations was to formulate a constitutional frame for BiH in accordance with its new, two-entity constitutional outline that was adopted in September 1995. This implied that the frame of the Fed-

eration of BiH needed to be adapted to the new frame for BiH; in other words, it was necessary to formulate some concrete steps to accommodate the fact of the constitutionally and legally established Federation of BiH with the new context, that is, the Dayton Constitutional frame for the entire BiH.

That is why DAIF was signed by those parties who were instrumental in the constituting of the Federation of BiH itself: Alija Izetbegović, in his role of president of the Republic of BiH, Krešimir Zubak, in his role of the Federation president, Haris Silajdžić as a prime minister of the BiH Republic government,¹ and Jadranko Prlić as a deputy prime minister of the BiH Republic government.² Additionally, the agreement was signed by the Croatian president Franjo Tuđman as a party who ‘endorses the provisions of this Agreement and shall assist in its full implementation.’ The witness parties were represented by four signatories: Ambassador Ischinger on behalf of the Federal Republic of Germany, Ambassador Holbrooke on behalf of the US, Ambassador de la Peña, on behalf of Spain in its then role of the EU presiding country, and Hans Koschnick, the EU administrator of Mostar. There is no doubt that the signatories signed on behalf of the institutions attached to their names; however, one should also keep in mind that they acted also as representatives of some other parties, and institutions, that the agreement refers to and that carry, or ought to carry, the main burden of its implementation.

What are DAIF’s key provisions, its basic content? The fundamentals of the agreement are established in its preamble, in ‘General Principles’ that carry predominant weight in the interpretation of the agreement:

1 ‘The Republic of BiH’ is a pre-Dayton form of the central government of BiH; with Dayton, the term ‘republic’ disappears; at the time of the DAIF signing, the functions of the republic were exercised predominantly by the representatives of the Bosniak-Muslim people as, from 1992 till 1994, both the Bosnian Serb majority and the Bosnian Croat majority had seceded from the rest of the republic.

2 My quotes from DAIF follow DAIF (1995).

The complete establishment of the Federation of Bosnia and Herzegovina is an essential prerequisite for peace in Bosnia and Herzegovina. Without a strong and fully functioning Federation, as one of the two constituent entities of Bosnia and Herzegovina, the proximity talks in Dayton cannot result in a lasting peaceful settlement.

Twenty months after the adoption of the Federation Constitution, the process of strengthening the Federation and building trust between its constituent peoples has still not produced satisfactory results. We, the undersigned, have therefore agreed to radical steps to achieve the political, economic and social integration of the Federation.

The four provisions define the key purpose of the adoption of the agreement. Additionally, in order to achieve the key purpose, the following two paragraphs of the agreement define some lower-order purposes, or auxiliary aims, that are envisaged as a means to achieve the key purpose; they define the commitments undertaken by the parties to achieve actually the key purpose of the agreement:

The responsibilities and the organization of the Government of the Federation and the Government of the Republic of Bosnia and Herzegovina must be separated. While working together in a spirit of cooperation for the benefit of the population, neither government may interfere in the exclusive competencies of the other government. Without prejudice to the continuing sovereignty and territorial integrity of Bosnia and Herzegovina, the Government of the Republic must now transfer functions to the Government of the Federation in accordance with the Federation Constitution.

The Government of the Republic must retain only those functions that enable it to act as the government of the internationally

recognized state of Bosnia and Herzegovina, in accordance with the Constitution of Bosnia and Herzegovina developed during the proximity talks in Dayton. All other functions will be transferred to the Government of the Federation. In parallel, the existing civilian authorities and their organs in the areas of the Federation controlled by the HVO [Croat Defense Council] must now transfer all their functions to the Federation organs and be dissolved.

Hence it is in its fundamental principles that DAIF refers to the Croat Republic of Herzeg-Bosna (HRHB), because the republic is the set of institutions to which 'civilian authorities ... in the areas of the Federation controlled by the HVO' refers. In such a sense both Zubak and Prlić act not only as the representatives of the Federation and the BiH Republic, but also as representatives of the HRHB. It is only under such an assumption that one can properly interpret the provision to the effect that the two undertake the commitment to ensure the transfer of authority from the HRHB to the Federation institutions. As the partner party undertakes some commitments, too, the party is in more precise terms defined in Paragraph A3 of the operational part of DAIF ('Decisions'):

The Government of the Republic shall keep those functions which enable it to act as the government of the internationally recognized state of Bosnia and Herzegovina. All other civilian functions of the Government of the Republic shall be transferred to the Government of the Federation within one month after adoption of this legislation. In addition, all functions of existing local civilian authorities and organs in the areas of the Federation controlled by the ARBiH [Army of the BiH Republic] shall be transferred to Federation institutions, and these authorities and organs shall be dissolved one month after adoption of this legislation.

This means that neither Izetbegović nor Silajdžić act only on behalf of the BiH Republic; they, for the purpose of this agreement, act

also as representatives of the authorities in the areas controlled by the Army of the BiH Republic.

If we envisage the sources of authority, or of state-constituting powers, as some points in space, here is what DAIF foresees: from one point the state-constituting powers are transferred to a middle point; the existence of the latter depends on the transfer of the same kind of powers from a third point to the middle one. It is assumed that the third point, at the time of signing, enjoys a 'surplus' of powers which (the extent of those will be defined shortly) has to be transferred to the middle point. Additionally, it is assumed that on its own part the first point has to transfer all its powers to the middle point; but it is also assumed that the first point will, together with the third one, participate in those powers that remain after the transfer of powers to the middle point. This assumption explains why Paragraph F of the operational part of DAIF addresses the issue of the agreements concerning the appointment of ambassadors. In simple terms: HRHB transfers its own powers both to the Federation and to the state level as defined by the Dayton Constitution; Bosniak-Muslim authorities, on the other hand, transfer some powers, which were previously considered as the powers of the BiH Republic, to the Federation, and they also retain some powers in accordance with the Dayton definition of the central, i.e., state level (in which both entities participate, as stipulated by the Dayton Constitution to which DAIF explicitly refers). DAIF explains such mutual transfer of powers (and their retention to an extent) in terms of a clear separation of powers—one government (the state level) must not usurp the powers of another government (the Federation one); i.e., the former must not interfere with the powers within responsibility of the latter, and vice versa.

We can immediately enumerate the powers to be transferred: 'Muslim authorities' and the HRHB ought to transfer the following powers to the Federation level: defense, internal affairs, justice, finance (budget, tax administration, customs collection), energy and industry, traffic and communications, commerce, agriculture, edu-

cation, science and culture, refugees, displaced persons and social policy, health, and city planning, resources and environment. However, one should keep in mind that this does not mean that such powers have to be transferred to the central government of the Federation; they ought to be transferred to the Federation in accordance with the Federation Constitution—if the constitution stipulates that the Federation cantons are responsible for the matters of education, then the powers ought to be transferred to the level of cantons.

At the state level (former ‘republic’), according to DAIF, the following powers are to be retained: foreign policy, foreign trade, customs policy, common monetary policy, finance (republic budget), immigration regulation and republic citizenship, international criminal law enforcement, common telecommunications, air traffic control, civilian coordination of the activities of the armed forces in the whole territory of Bosnia and Herzegovina. These are exactly the powers of the state-level BiH as foreseen by the Dayton Constitution (Constitution of Bosnia and Herzegovina 1995, Annex 4, Article 3.1). It is also important to emphasize that DAIF foresees a continuation of both the Army of the Republic of BiH and the HVO, which is stipulated in the following terms: ‘the division of responsibilities as set out in Paragraphs 5 and 6 above shall not diminish the military authority of the ARBiH or the HVO.’

An attentive reader must have noticed that it seems as if I smuggled the term ‘Muslim’ into my analysis. However, I have simply taken over the terminology used by the US State Secretary Christopher while welcoming the signature ceremony of DAIF (Christopher 1995). In his address Christopher emphasized two facts of essential importance for the understanding of the agreement: First,

The Federation is an essential building block of peace in Bosnia-Herzegovina as a whole. In the peace agreement we are discussing, the Federation will be one of Bosnia’s two constituent parts. For a settlement to endure, the Federation must be functioning

and strong. A year and a half ago, the United States helped to mediate the agreement that created the Federation. That agreement saved countless lives by ending the fighting between the Bosniak [Bosniak] and Croat communities of Bosnia-Herzegovina.

Second,

The agreement finally gives the Federation the authority to govern effectively. The central government of Bosnia-Herzegovina will keep the powers it needs to preserve the country's sovereignty, including foreign affairs, trade, and monetary policy. It will transfer most of its other responsibilities, including police, courts, tax collection, health and education to the Federation. The new structures the agreement creates will replace all of the separate local Croat and Muslim authorities on Federation territory.

Also we need to emphasize the fact that, in its basic principles, DAIF refers to 'the constituent peoples of the Federation.' In other words, it is clear that both the American mediators and the parties to the agreement are aware of the fact that DAIF is an agreement between the constituent peoples of the Federation of BiH in the shape of an agreement between the representatives of the peoples. The peoples concerned are both Croat and Bosniak people as two constituent peoples of the Federation, and also of Bosnia-Herzegovina, to which a third people is added the representatives of which, however, have not taken part in the creation of the Federation or DAIF. Hence, from a formal and jurisprudential point of view, it is crystal-clear that the persons who signed DAIF in fact play a triple role: for instance, Krešimir Zubak signs the agreement in his role of the Federation President, in the sense of an institution that is yet to be built, and also in his role of the representative of the HRHB, as a gradually 'diminishing' institutional role; and, last but not least, also in his role of a legitimate representative of the Croat people as

a people constituent to the Federation, in the sense of a constitutional-democratic role.

The understanding of the interrelationship between the roles is of a critical importance for the understanding of DAIF itself. Zubak acts primarily as a representative of the constituent people that, in the sense of a political community, can consume, or materialize or safeguard their rights in several ways. HRHB is one way of safeguarding of such rights, but it is not the only one. DAIF stipulates that, in the future, those rights will be implemented within the Federation as a community composed of two equal and equally constituent peoples who enjoy equal rights including the rights to democratic representation, legislation, the protection of peace and security, and the regulation of their shared relations to some third parties.

2.2 Key implications

Let us now look closer at the key implications of this agreement. What does the adoption of the agreement imply for both parties and also for the Dayton framework for peace in its entirety?

1. HRHB has been recognized as an indirect source of constitutional powers. It is not viewed as a direct source—the only direct source can be in a sovereign or constituent people. DAIF clearly states that some civilian government powers ought to be transferred from the HRHB to another body under some conditions. Hence the key commitments are defined both by the body (HRHB) that endows another body (Federation) with its state-making powers as well as by the powers that the endowed body (Federation) ought to possess, in contrast to the central governmental powers as harmonized with the Dayton Constitution.

2. The primary source of such constitutional, or state-making, powers is not in the HRHB as such, but in another fact, which is the fact of constitutionality, or constitution-making capacity, of a peo-

ple. A people is recognized as a political community to which some rights are attributed in accordance with both constitutional and international law; for instance, a people have the right to elect their own democratic representatives according to constitutional principles in order to establish a kind of governance that enables them to live in peace and safety.

3. The same considerations apply to both the Bosniak people and the Bosniak representatives, and also to the ‘civilian governmental authorities in the area controlled by the Army of the Republic of BiH.’

4. The Federation is a bi-ethnic entity. The representatives of two, not three, peoples have partaken in its establishment, and the two have invested into it their own constitutional powers. The representatives of the Serb people have not taken part in the constitution of the Federation. Hence they cannot be a constituent people to the Federation; their constitutional powers are invested into Republika Srpska (and also partly into Bosnia-Herzegovina).

5. However, this does not mean that the constituent peoples of BiH cannot influence the entity to which they are not constituent. They merely give up their right of constitutionality within the other entity. At the level of the state all the peoples are equally constituent, or coconstituent, which of course depends on an exact definition of the notion of ‘state powers’ or ‘responsibility of the state.’

6. The authentic understanding of the Dayton framework for peace is as follows: two strong entities, one loose central government.³ It is only through such understanding that one can grasp the key reason for the adoption of DAIF—that is, the Bosniak-Muslim side ought to return many powers from the state to the entity level. The purpose of DAIF is in a ‘strong and fully functioning’ Federation.

3 See also Holbrooke (1999b, 96-97). Holbrooke also emphasized that the Dayton Constitution defined two strong entities and one loose central government at a meeting between Alija Izetbegović, and his staff, and Krešimir Zubak, the then BiH Federation President, which I attended in the role of Zubak’s Chief of Staff. The meeting took place at the BiH Presidency building, Sarajevo, on 18 July 1996.

7. DAIF is a contract, an agreement between two parties, and neither party in the agreement is presented as the superior one. The agreement is a contract between the peoples that jointly constitute the Federation signed by the peoples' representatives. Both parties are committed to acting 'in parallel.' In other words, both parties undertake some commitments that are nearly identical and that ought to be implemented simultaneously. In the light of DAIF, HRHB and the Republic of BiH await the same destiny. Also it is important to keep in mind the following: the agreement does not refer to some actions that can be performed fully or be completed and terminated—it is an agreement that foresees a continuous activity; the commitment to retain the powers at the level of the Federation, either at the level of the central Federation authority or of a canton, never ceases. This also means that the existence of the Federation as a constitutional frame requires a persistent, continuous effort and investment that feed potentially never-ending activity.

8. Apart from some linguistic-terminological detail (DAIF stipulates that, in the case of a conflict of interpretations, its English version is taken as more authentic than either the Croatian or Bosnian versions), the parties to DAIF do not expect any serious problems in interpretation of its key provisions. The agreement itself can be viewed as 'interpretive' by its very nature—it clarifies or, more precisely, defines the powers to be exercised by the parties and to be transferred by the parties to different levels, according to the agreed rules. DAIF did not foresee the institution of an ultimate interpreter or a 'High Representative'—it assumed that there would not be any need for such an institution because, according to Vattel's rule, '*In claris non fit interpretatio*' (When the matter is clear, interpretation is unnecessary).

9. Conventional international legal norms apply to DAIF simply because the agreement is a part of international law. If a party violates an agreement, the other party has the right to demand the return to *status quo ante*, the state that existed prior to the period of the signing of the agreement (Aust 2013, 281). If a party does not

transfer the powers in accordance with DAIF, this means that the agreement has been violated. Since the *status quo ante* and the initial positions by the parties are clearly defined, it is quite obvious what, in this context, the right to the return to a *status quo ante* implies, and to which agent or entity does it pertain. On the one hand, the right pertains to Croats as a constituent people and, on the other, to Bosniak-Muslims as a constituent people; the return to *status quo ante* is a return to two separate constitutional and institutional frames: the frame of 'civilian authority in the area controlled by the HVO,' i.e., HRHB, and the frame of 'civilian authority in the area controlled by the Army of the Republic of BiH' as well as of the very republic in its pre-Dayton constitutional shape.

10. The previous aspect implies the fundamental rationality of both the signatory parties and the identity bearers represented by the signatory parties. In other words, one should not assume that the parties signed a 'suicide pact' in the sense of an agreement that foresees, for instance, the disappearance or deconstituting of a constituent people in a legal-political sense. Hence, it is impossible to assume that either party has signed a contract the implementation of which leads to a loss of the party's fundamental rights, or to elimination of the principle that constituent peoples cannot adopt a frame through which their constituent powers, or rights, are gradually diminished or disappear altogether.

In a political sense DAIF was also a part of a long process that aimed at a compromise between the Croat and the Bosniak interests within BiH. Such compromise was formulated only with enormous difficulties as attested by the statements by the leading Croat and Bosniak politicians in the period between the adoption of the Washington agreement and the Dayton peace talks. For instance, Ejup Ganić, a 'Yugoslav' member of the Republic of BiH Presidency, and later a Bosniak vice president of the Federation of BiH, told the Croatian daily *Slobodna Dalmacija* (29 December 1994) that, to Muslims, the Federation serves as 'a means of the preservation of BiH and of a military victory over Serbs.' In other words, like a majority of Bosniak repre-

sentatives at the time, Ganić viewed the Federation as a temporary military alliance to fight and defeat the Serb people within BiH, which can hardly be described as a politics aimed at compromise or at the creation of conditions favorable to a negotiated peace. On the other hand, Vladimir Pogarčić, a former high-ranked official of HRHB, in a statement to the daily *Večernji List* (26 August 1995) pointed out that HRHB enabled both the defense and survival of BiH as an internationally recognized state, which is why HRHB had no expiry date.⁴

DAIF formulated a kind of compromise between those opposed visions—to Croats a kind of federalization was offered, in an area of BiH, by which both their collective and individual rights would be safeguarded even after the dissolution of HRHB; to Bosniaks the preservation of BiH was offered, provided they gave up their goal of an indivisible BiH that could not be federalized or reorganized in accordance with its multiethnic character. Judging at least from the way in which the whole peacemaking story was brought to a conclusion at the Dayton talks, all parties, including the Serb representatives, should have become aware of the compromise they endorsed and consequently should have continued implementing it in good faith, with no obstacles or major setbacks. However....

2.3 The Dayton peace implementation as a process of violation of DAIF provisions

By the end of 1997, the ‘international community’ has taken a full control over the process of implementation of the Dayton framework for peace, to which the US assumed the key role due to a number of factors. In the course of the process, which was steered in the spirit of enforced and irrevocable interpretations of the Dayton framework through the figure of the High Representative,⁵ as a dictato-

4 My quotes of Ganić and Pogarčić follow Topor (1996).

5 See also Pehar (2012b), and Chapter 6 in which the institution of the High Representative is extensively analyzed.

rial power over BiH, two key structures were imposed that undermined and unsettled directly both DAIF and the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP). First, special election rules were introduced that enabled the Bosniak-Muslims, as a constituent people, to elect the Croats as the Bosniak, not Croat, representatives to the Federation legislative assemblies. In other words, one constituent people has been empowered to influence critically the legislative representation of another people, by which the latter's right of constitutionality has been violated; in this case it is the right of a fair and independent representation of the people to the bodies that the people have originally cocreated through their representatives.⁶

We should immediately notice that one cannot really say that the people lost their constituent or constitution-making powers—this is impossible. However, we can say that the people have been deprived of the chance to implement the right that pertains to them due to their constituent status; in a normal multiethnic community such a right would be guaranteed and safeguarded. Second, but as a part of the very same structure, another misguidance of the international community was in the imposition of an election rule that enabled the election of the Croat member of the BiH Presidency by a Bosniak majority vote. Again, the BiH Presidency member, who should be representative of a constituent people, is not such a representative, or is a representative in a wrong way.

Also, it does not make sense to expect that a person, who is not representative of a constituent people, be responsible toward the people, or to promote the interests of the people within the BiH Presidency. Now, if such a responsibility is not included into the authority of a BiH Presidency member, how to explain the fact that, as a part of the Dayton Constitution, the number and names of the constituent peoples in the BiH Constitution preamble coincide with the collective identities of the members of the BiH Presidency? Addition-

6 For an empirically detailed explanation, see Vukoja (2013) and Vukoja and Sitarski (2016).

ally, one of the most obvious consequences of such imposed implementation of the Dayton peace accords is in its capacity to turn BiH's multiethnic character into a mockery or deny it utterly.

Furthermore, it is quite easy to explain the sense in which the election rules in force, so-called 'Barry rules'—named after US ambassador Robert L. Barry, who served as a chief of the Organization for Security and Co-operation in Europe (OSCE) Mission to BiH charged with the oversight of the election process and legislation, from 1998 to 2001—directly violate DAIF. First, DAIF foresees a precise transfer of powers from the HRHB level, and the Bosniak-Muslim Republic of BiH, to both the Federation and the state level in accordance with the Dayton Constitution. Croats, as a constituent people of the Federation, ought to be represented not only at the Federation legislative bodies, but also in the BiH Presidency that, according to the constitution, immediately reflects the two-entity structure of BiH. It would not make sense to assume that Croats, as a constituent people of both the Federation and BiH, handed over to Bosniaks their own right of democratic representation in the key state body of executive power, i.e., the Presidency. However, as the election law does affirm such an assumption, it is in direct violation of DAIF.⁷

The topic of the election method for the BiH Presidency members carries even higher importance due to the quasi-commitment (to reform its constitution) imposed on BiH by the European Court of Human Rights through the *Sejdić and Finci* case (22 December 2009; see ECHR 2009). The Dayton Constitution does not stipulate that, prior to elections, the candidates for the post of BiH Presidency member need to declare their ethnic identification/affiliation. It is the election law that demands this declaration from them.⁸ Hence, the election law is unconstitutional in such regard too; but we need to keep

7 A more detailed argument is presented in Chapter 4.

8 In this regard too, the International Crisis Group (ICG) fabricates data; in their Europe Report No. 209 the ICG claims as follows: 'The constitution [of BiH] specifies that only those who declare themselves Bosniaks, Croats or Serbs can be elected to the state presidency and to its House of Peoples' (ICG 2010, 20n201).

in mind that the law was imposed by the international community. In other words, the very demand that the BiH Constitution be radically revised, or reformed, is founded on some flawed, and by the international community imposed, premises.

If one bothers to read the Dayton Constitution attentively and carefully, it is clear that, once they are elected, the members of the BiH Presidency designated as 'Serb,' 'Bosniak,' and 'Croat' need to figure as the representatives of the three peoples, which means that the provision of the Dayton Constitution dealing with the composition of the Presidency applies only after the elections are finalized, hence, means that the names of the three collective identities pertain to the elected Presidency members, not to the candidates. The three presidency members are a 'Serb,' a 'Croat,' and a 'Bosniak' in the sense of 'the representatives of Croats, Serbs, and Bosniaks.'

This also implies that the said provision of the constitution is not discriminatory because both Sejdić and Finci are, in accordance with the constitution, authorized to run for the post of a BiH Presidency member. Actually, it is the current election law that prevents the two from doing so, and thus discriminates against them. Hence, a charitable and reasonable interpretation of the Dayton Constitution resolves the issues easily and efficiently. Besides, it is quite clear that the approach I advocate is distinctive in its ability to resolve both the *Sejdić and Finci* issue and the 'Komšić' issue in a single move. In contrast, the approach by the 'international community' makes those issues increasingly complex, entangled, and insurmountable, and de facto undermines the functioning of BiH as a multiethnic democracy.

In July 2000, the international community introduced another structure which violates both the Dayton compromise and DAIF. It has done so through its positive response to the appeal submitted by Alija Izetbegović to the BiH Constitutional Court. The appeal demanded that BiH peoples get the attribute of constitutionality throughout the territory of Bosnia-Herzegovina.⁹ The Court's ruling

9 For the text of the ruling by the BiH Constitutional Court, see BiH Constitutional Court (2000).

was by a majority of Bosniak and international judges who outvoted the Croat and Serb judges. This strongly indicates that the ruling was politically motivated—the pre-Dayton conflict of political ideas, that gave rise to the war in Bosnia, continued into the post-Dayton period and in 2000 infected also the BiH Constitutional Court. Following the announcement of the ruling, local media reported that the then High Representative, Wolfgang Petritsch, held a meeting with the international judges prior to the Court's concluding session; he thereby exerted an undue influence comparable to the influence exerted by the American president, James Buchanan, on the US Supreme Court prior to the passage of the 1857 *Dred Scott* decision, which declared that the practice of slavery was in accordance with the US Constitution, and which arguably paved the way for the outbreak of the American Civil War. What was the essence of the BiH Constitutional Court ruling of July 2000?

Briefly speaking, the ruling declares that the Serb people are constituent to the Federation, too, and that both Croat and Bosniak peoples are constituent to Republika Srpska (RS). This means that both entities become multiethnic in the sense that all three peoples become constituent to both entities and BiH as a whole.¹⁰ However, does the decision make sense in light of two facts: a small number of Bosniaks and Croats have remained, or returned to, RS; and the number of Serbs who remained within the Federation is roughly estimated to 50,000? Second, and more importantly, the Serb people representatives were not asked a question concerning the establishment of the Federation, while neither the Croat nor the Bosniak people representatives participated in the creation of RS—they recognized it in 1995/96, but that is an act that differs from the act of original constitution. In other words, it is clear that the entities, taken individually, are the product of the will of some, but not all constituent peoples.

To this it is possible to reply that the constitutionality of the peoples throughout BiH territory is a matter of justice; a different deci-

10 See also O'Brien (2010, 342–343).

sion seems to confirm the results of the ethnic cleansing. However, every compromise is partly just and partly unjust from a certain perspective. Both parties to a compromise must accept some concessions that are, from their narrow perspective, unjust; however, such concessions are the *sine qua non* of a compromise. For instance, the Serbs might claim that it was not fair to preserve the BiH that Alija Izetbegović claimed had to be indivisibly sovereign, which was one of the major causes of war; also Bosniaks could say that the very existence of Republika Srpska, one of the two BiH entities, is unjust, etc. In other words, I suggest to those willing to think reasonably about the Dayton compromise to pose some simple questions: Why have the Dayton constitutional structures been formulated in the way they have? What have the parties to the compromise gained through their concessions? What kind of moral-political balance have they aimed at to make their 'home' peaceful and safe?

Additionally, the BiH Constitutional Court ruling was passed despite the fact that the thesis, that all three peoples were in a precise sense already constituent throughout BiH territory, that is, prior to the ruling, is impossible to refute. Namely, the peoples are viewed as constituent to their entities, the Serb people to RS, the Bosniak and the Croat peoples to the Federation; however, under the Dayton Constitution, all three peoples are viewed as constituent also to BiH, which applies to its entire territory, simply due to the fact that, under the Dayton terms, BiH as a state retains some constitutional powers. Since the BiH institutions are representative of both entities, the three peoples coconstitute those institutions through their legitimate representatives.¹¹

Besides, the Constitutional Court ruled as they did; however, the ruling's practical implementation was even more problematic than the ruling itself.¹² The international community's way of imple-

11 The issue of the July 2000 BiH Constitutional Court ruling is further, in full detail, discussed in Chapter 3.

12 From July 2000 till April 2002, High Representative Petritsch did everything he could to make sure the entity parliaments of their own amended the entity constitutions by two-thirds ma-

menting the ruling was as follows: one simply adds some members of the constituent peoples concerned, for instance the Bosniak and Croat peoples, to the RS legislative bodies, and one thus quasi-ensures the equality of the peoples throughout BiH territory. This, of course, makes no sense. As long as they remain unable to elect their own representatives to the bodies of the entities, the peoples remain nonconstituent despite appearances to the contrary. Hence, the international community in fact simulated an equal constitutionality of the peoples throughout BiH territory; the simulation takes the members of the peoples in a fictive sense as the representatives of the peoples despite the fact that, self-evidently, the membership and representation do not coincide with, or guarantee, one another.

A simple example: according to the constitution High Representative Petritsch amended in 2002, RS has two vice presidents who have to come from the nonmajority peoples, i.e., Croats and Bosniak-Muslims. According to the international community, this, and similar institutional facts, should suffice for one to claim that the Croat people are constituent not only to the Federation, but to RS as well. However, it is clear that the vice president is frequently elected to the post by the Serb, not the Croat, vote; this means that the Croat vice president in RS is actually a representative of the Serb, not the Croat, people. In other words, regardless of the election of the vice president, the Croats remain as nonconstituent to RS as they were without the BiH Constitutional Court July 2000 ruling and Pe-

juries; ultimately, the effort was proved futile. Hence, in April 2002, Petritsch decided to impose the entity amendments (Amendments 27-54 to the Federation Constitution, four amendments to the RS Constitution as Petritsch assumed that the RS Parliament Speaker already expressed endorsement of a major part of the amendment package by RS; and amendments, some very extensive, to sixteen articles of the BiH election law subsequent to the constitutional amendments). His decision was jocularly named the 'Airport decision' (by the international community officers) because it was his last-minute decision, signed weeks prior to his departure from Bosnia (see, for instance, OHR 2002a). Generally speaking, this means that the 'international community' failed in its attempt to change the constitutional landscape of Bosnia—they tried to do it through the venue of a fully legal, internal sovereign, but then, having failed in that venue, decided to use the venue of 'the external sovereign.' However, also keep in mind that the BiH political elite in a sense legalized Petritsch's amendments by accepting the rules of the game, i.e., the parliaments' composition as it had been in accordance with Petritsch's amendments to the election law that reflect directly his 2002 constitutional amendments.

tritsch's 2002 constitutional amendments. Similarly for the level of the Federation, in April 2002 High Representative Petritsch declared amendments to the Federation Constitution that altered the original ethnic composition of both legislative and executive bodies. Take as an example Petritsch's Amendment 44 to the Federation Constitution: it does not ensure ethnic equality, or coconstitutionality; it harms the Croat constituent position within the Federation by stipulating that eight Federation ministers are to be of the Bosniak, five of the Croat, and three of the Serb affiliation.¹³

Why is a half of the total number of ministers Bosniak? There is no defensible, nonarbitrary answer to the question. Why has Petritsch allowed the outvoting of the Croat ministers, i.e., the simple majority rule in the Federation government? Again, one cannot get a defensible answer. Especially, there is no defensible answer to the following question: If the Bosniak people can elect a disproportionately high number of the members of all legislative bodies, who are also members of the Croat and Serb peoples, why should we at all consider the two peoples as equally constituent to the Federation? Also, keep in mind that the Federation was established by a mutual agreement between the representatives of both Croat and Bosniak peoples as equally valid parties to a contract that is constitutive not only of the Federation, but also of BiH itself.

13 See OHR (2002b; 2002c). One needs to keep in mind that Petritsch imposed the 2002 constitutional amendments as a transient step: they are intended as a device to secure full implementation of Annex 7 of the Dayton Agreement, meaning that, by the amendments, the international community was preparing the ground for a full-scale return of the refugees to both BiH entities; once the refugees returned massively to their homes of origin, the pre-Dayton 'Paradise of BiH' would be restored, and the Dayton constitutional categories would be annihilated. This, as I explain in Chapter 3, explains the reasoning of the BiH Constitutional Court in the U 5/98-III decision. However, to expect a massive refugee return after the war that was, first, fought exactly over the political and constitutional principles and, second, settled through a classical constitutional compromise, is indeed an irrational, or faked, prediction. Following a war, especially one that was fought by popular armies as in BiH, it is nearly impossible to restore the prewar 'period of innocence,' and more importantly, it is irrational to claim that, in a constitutional and political sense, the prewar period was one of innocence, and thus worthy of restoring. For more detail on Petritsch's 2002 amendments, see Vukoja and Sitarski (2016, 240-244); also keep in mind that Petritsch (2011, 33) stated very clearly: 'I imposed the right of [refugee] return; it was up to the people to exercise this right, or not.'

Hence, summarily, the international community interpreted the Dayton framework for peace in the way that violates the fundamental principles of the Dayton compromise, especially the principle of the constitutionality of the two peoples within the Federation, and thereby also violates the key provisions and principles of DAIF despite the fact that a majority of UN Security Council resolutions, from the end of 1995 till today, officially reiterate and confirm explicitly the Security Council's commitment to the treaty.

Finally, apart from having introduced the two structures as a part of an imposed implementation/interpretation of the Dayton framework, the international community decided to apply another strategy—one of the strengthening and expanding of the central powers of the state. Such a strategy is irreconcilable both with the Dayton peace plan, i.e., the constitution, and with DAIF, which is constitutive of the Federation. For instance, the authentic understanding of the Dayton Constitution does not foresee any central BiH powers in the area of defense. However, the international community obviously decided to exploit the vague provisions of the Dayton Constitution, including one on the BiH Presidency as 'exercising a civilian command authority over armed forces,' to expand the central powers of BiH. One, however, ought to keep in mind that DAIF itself operates on the premise that the entities need to be strong, while the central government should be weak or loose. A strict adherence to such a premise implies that the provisions on the powers of the Federation, not of the state of BiH, ought to be read widely; the international community, however, decided to apply an opposite strategy.

That is why today we have a very curious situation in BiH: the Dayton BiH is originally founded on the agreement stipulating that a party ought to return many powers from the central (former 'Republic of BiH') to the entity level, whereas the very implementation of the Dayton Constitution, as dictated by the international community (including the US and the UK primarily), redirected those powers back to the central, state level. It seems that one party to the

agreement, the Bosniak one, in the course of the agreement implementation has been treated unduly as the most favored one—the powers the Bosniak side had to return to a lower, or entity, level to ensure the compromise and peace through a classical federalist blueprint, as a part of their original 1995 commitment, have been in the course of the post-1997 Dayton peace implementation returned to the level at which the side originally desired them to be. However, keep in mind that such a desire, a desire of one side to figure as a ‘foundational,’ even ‘a majority people’ to BiH, or a people endowed with the ‘surplus of rights’ vis-à-vis the other two peoples, acted as a cause of deep political disagreement and contributed to the outbreak of the 1992–1995 war.¹⁴

The aforementioned fact of the expansion of state powers clearly indicates that the international implementers of the Dayton agreement give only a verbal, not a real, support to DAIF. Their actual acting is in direct violation of the key provisions of the agreement: the ones relating to the constituent peoples of the Federation, to a parallel transfer of powers for the purpose of the strengthening of the Federation, and to the principled equality of the signatory parties. Hence, one should not find it surprising that one of the main ideologues of the American post-Dayton constitutional intervention in BiH, the International Crisis Group (ICG),¹⁵ suggests that DAIF had not been signed at all and that the UN Security Council only pretends to be supporting the agreement. For instance, ICG claimed the following in 2010:

Dr. Christian Schwarz-Schilling, the international mediator for the Federation (1994-2004) and the international community’s High Representative (2006-2007), tried to persuade the Bosnian [Bosniak] delegation at Dayton to place their strategic interests first on the level of the Federation and then on the state. He

14 For more on this, see Pehar (2011a, esp. 141-153).

15 See, for instance, Kostić (2014).

compared this with West Germany's strategy after the Second World War, which ultimately achieved East Germany's peaceful reintegration. The delegation, persuaded by then-BiH Premier Haris Silajdžić, rejected this advice. (ICG 2010, 2)

The ICG here passes in silence over the fact that the 'Bosnian delegation,' by signing DAIF, adopted the exact strategy that Schwarz-Schilling 'tried to persuade them' to take on and that Haris Silajdžić himself was the one who cosigned the agreement. Under the understanding that they, by signing the Dayton peace plan, also signed up to the formula of 'two strong entities, one loose central government,' the formula that is also implied by DAIF, the 'Bosnian delegation' adopted and signed both documents. One should add another fact related to the ICG report, because the fact is closely related to the aforementioned detail. In the report the ICG claims that 'In Bosnian constitutional theory, inherited from the former Yugoslavia, the state was created both by individual citizens and by specific national groups, its constituent peoples. Constituent peoples enjoy collective rights regardless of their numerical size' (ICG 2010, 3n20). Here it is nearly impossible to avoid the impression that, by rhetoric easy to see through, the ICG treats the constituent peoples, a key part of the Dayton Constitution preamble, as a dubious constitutional category whose origins lie in the backward communism that should be put in the dustbin of history (see also Western and Serwer 2000, 6).

Before setting out some policy recommendations, I will bring this part to a close by an analogy I deem fit to illustrate the key facts related to the implementation of both DAIF and the Dayton peace framework. Carl Schmitt, an influential German political scientist and legal theorist, especially in the decade before World War Two, published in 1933 an acclaimed essay entitled 'Legality and Legitimacy.' The essay was published at the time of the Nazi assumption of power and their nearly explicit abrogation of the Weimar Constitution. The essay warns about the dangers that the figure of the so-

called ‘extraordinary lawgiver,’ a legal personality who gives an ultimate interpretation of a constitution and who decides on the applicability of the constitution in critical periods, poses to any constitution, including the Weimar one.

Schmitt also emphasized that the power of adding amendments to a constitution could be exploited to abrogate or suspend some value-related aspects of the constitution, or those aspects that affirm the values that underlie the constitution (or agreement) (Schmitt 2004, 95). He furthermore noticed that every winner of political elections gains inherently a ‘supra-legal premium’: the party gains a position through which, due to its sheer political power, it can direct the legal framework of the state toward a political direction, purpose or goal, as it desires or finds worthy of implementing (Schmitt 2004, 31-33). Schmitt also warned about the dangers posed by the revolutionary parties that are particularly inclined to exploit their ‘supra-legal premium’ and that, via the figure of an extraordinary lawgiver, or the ultimate constitutional interpreter, can subordinate the values of the constitution to their political interests, or even eliminate such values in order to open the room to their arbitrary political acting, without constitutional constraints.

It is interesting to note that Schmitt’s essay can be read as a very precise prediction of the Nazi attitude to the Weimar Constitution—by relying on the provisions concerning the state of emergency, the Nazis actually suspended all fundamental human rights, including the right of ‘equal chance’ (for all the parties), and thus abrogated the key value-related aspects of the Weimar Constitution. In purely formal terms, during the Nazi era the constitution never ceased to be in force; however, the Nazis reinterpreted the constitution, which enabled them to replace the constitutional value system with the decrees of the state of emergency. This then gave them the opportunity to declare the Communist Party illegal and drastically narrow freedom of expression, thought, or association.

Similar developments took place in the post-Dayton BiH in the course of implementing the accord’s key elements. The figure of an

extraordinary lawgiver, the High Representative, was introduced, which allowed an international actor, the US primarily, to direct the implementation of Dayton toward the political goals it found desirable, suitable, or preferable. Second, despite the fact that the constitution remained in force in formal or legal terms, the values that the constitution was supposed to safeguard, including primarily the rights of the constituent peoples, had been abrogated or suspended. To put it in the most precise terms, those values had been prevented from materializing.¹⁶ Third, such an approach can hardly be described as constructive—it did not support or sustain BiH as a democracy or a federal consociation, nor had it any connection to the actual multiethnic character of Bosnia-Herzegovina; in fact, it harmed and humiliated all the constituent peoples and citizens of Bosnia-Herzegovina, affecting most adversely and most directly those who were the least numerous and thus most vulnerable, i.e., the BiH Croats.

2.4 Policy recommendations

The international community, involving primarily the US, the major EU powers and the Russian Federation, should recognize that, thus far, the process of implementation of the Dayton framework has been futile and misguided. If the latest report by the ICG suggests anything, it is that the process led nowhere.¹⁷ It is impossible to implement a peace framework in the condition of the state of emergency which the international community created and preserved through the body of the High Representative.¹⁸ As a part of

16 As Mato Tadić, a BiH Constitutional Court judge, explicitly stated, 'Of 109 amendments to the [original] BiH Federation Constitution, 73 were imposed by the High Representative; in comparison to the original bill of rights guaranteed through the 1994 Federation Constitution, more than 90% of the imposed amendments contain the diminishing of the Croat collective rights' (quoted in Vlaisavljević 2015, note 18; the translation from the BSC original is mine); for a detailed presentation, see Tadić (2013).

17 On this report, see IDPI (2014).

18 The nature and impact of the institution is further discussed in Chapter 6.

the same recommendation, one should keep in mind that imposed solutions of any kind, like any imposed structure that cannot be reconciled to the authentic Dayton compromise, are untenable in the long run, hence stillborn. The same applies to the current attempts to 'push' the parties toward a kind of reform of the constitution that is defined well in advance.

Additionally, the international community should finally come to terms with two key facts: the basic intention of the constitutional emphasis on the category of the 'constituent peoples' in BiH boils down to the intention to prevent ethnic discrimination. It would be meaningless to try preventing such discrimination without referring explicitly to those ethnic categories with which a super-large majority of BiH citizens actually identifies and which are used as the foundation for identification and attribution of collective rights.¹⁹ The thesis, that such rights cannot be at all put into harmony with individual rights, or that the former somehow inherently undermine the latter, is a political myth that serves in BiH primarily as an ideological weapon of the continuation of war. Also, keep in mind that endorsement of such a thesis would prevent the US, or any other state the constitution of which refers to some specific collective rights, from functioning, too. Second, 'pushing' the implementation of the Dayton framework in the direction that one party to the framework finds compatible with its interests, that also coincide with its wartime definition of its interests, supplies a perfect argument to the other two parties to demand a return to the *status quo ante*. Such 'channeling' of the process of Dayton implementation not only feeds the aspirations of Bosnian Serbs and Croats toward a full recovery of Herzeg-Bosna, or full RS independence; it justifies them, and supplies them with additional strength.

Those who view themselves as legitimate representatives of the BiH Croats must realize that, in the given conditions, they have a legitimate right to call for a return to the *status quo ante*. This would

19 For more detail, see Pehar (2011b).

provide ample negotiating room in all the future talks about the future of BiH, including the talks about the issue of the reform of the Federation. The same pertains to the Republic of Croatia which, as one of the five signatory parties to the Dayton peace accords, has committed to assisting implementation under its own authority, not that of the High Representative or the US. The Croatian representatives should realize that a neutral stand vis-à-vis the recent developments, or current state, of BiH is harmful not only in a moral, but also in a legal or political sense. The BiH Croats, as one of the three constituent peoples of BiH, have been prevented from enjoying the collective rights that follow directly from the preamble to the Dayton Constitution.

To repeat, the key agreements signed at Dayton do not imply a 'suicide pact.' It is impossible to interpret such agreements as authorizing the process of deconstituting the Croat people as a constituent people of BiH. This also implies that the Croat, or Croat-oriented, parties in BiH should be much more aware of the fact that the rules of the game currently in force in BiH, including primarily the election law and despotic judicial interventions by the BiH Constitutional Court, had been imposed on unjustifiable and arbitrary grounds. The will to remove such rules should be much more clearly pronounced in the Croat-oriented parties. If you continue to participate in the game in accordance with the rules of which you claim that they are unfair, your claim will be taken with a decreasing seriousness and will necessarily lose in credibility. However, one should continue to participate in the game in a temporary sense, as long as the game leaves one a minimal chance to alter the rules, with the proviso that one then needs to work actively on the rules' alteration during the time the chance was given to one.

For all the parties to the Dayton BiH, the relations would certainly undergo a radical change once a simple fact was brought to awareness—the party who signs to an agreement is a party who gives a promise.²⁰ Following the act of promise giving, two requirements

20 See Sheinman (2011) for a basic account.

pertain to the promise giver: a) to know the content, the meaning of the words by which the promise was formulated; b) to respect, or actively adhere to, the words in their future acting. For the time being, the international community in BiH prevents the BiH parties from fulfilling their promise by suggesting that they do not sufficiently know the meaning of the words that make the substance of their promise. As long as the suggestion is taken for granted, the Dayton promise will be impossible to fulfill. The so-called 'international community' seems thus far unable to recognize this fact, which is why, despite the appearances or claims to the contrary, the implementation of the Dayton peace treaty in reality has not been taking place.

***Politische Justiz*, Fictive Histories, and Irrationalizing Interpretation at the Bosnian Constitutional Court (U 5/98-III)**

The chief task of this chapter is to assess the BiH Constitutional Court decision of 1 July 2000 (U 5/98-III), which can be reduced to an attempt to demonstrate that the Dayton BiH Constitution implies a thesis on constitutionality for all three BiH peoples throughout BiH territory,¹ without qualification. My aim here is to demonstrate that the decision is implausible as it rests on a flawed interpretation of the constitution.² Such a demonstration is presented in Part 2 of the chapter. Part 1 is an important introduction to the considerations in Part 2: it addresses the issue of foundational elements that all legal interpretations need to include, and offers a view of interpretation that applies to all courts, including the BiH constitutional one. Following the assessment of U 5/98-III, which reads the decision in light of political concerns, politicization, and political ideology, as a dominant and arbitrary factor of interpretation, Section 4 of Part 2 offers a number of analogies from the legal past, the American and German jurisprudential contexts in particular, to point to the future directions in which our common perceptions (and future reinterpretations) of the U 5/98-III decision are highly likely to evolve.

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- 1 This directly relates to the BiH Constitution (Constitution of Bosnia and Herzegovina 1995) preamble which designates 'Bosniaks, Croats, and Serbs' (together with Others) as 'constituent peoples' of BiH. I think it is safe and reasonable to assume that the peoples should be deemed the key 'constitution-making actors.' The three peoples have together, but due to their individual interests, decided to adopt a single and shared constitutional structure.
 - 2 Despite this, the decision is probably the most famous of the BiH Constitutional Court decisions and is held in high regard by the Bosniak-Muslim political elite in BiH (see, for instance, Ćurak 2000).

Part 1

The task of legal interpretation, in the sense of the process of interpreting of the language of legal documents including regulations, laws, and constitutions, is not especially demanding.³ We should be up to the task simply due to our mastery of a natural language (English, Russian, Croatian, etc.), when such mastery was gained through a sufficient level of self-reflection. The communication-related conditions marked by a lack of clarity (e.g., a rhetorical figure, allusion, an open-ended sentence, ambiguity, and similar) are relatively frequent and we encounter those when we are language-learning children. This, of course, means not that the human users of language all stand on an equal level of language-related mastery or creativity. Individual variation in the matters of a creative and pertinent interpretation is a fact of life. However, as a matter of principle, it is, I think, impossible to designate some specific professional groups as guaranteed performers of successful interpretation (e.g., lawyers, judges, or university professors). Creativity in the tasks of interpretation is not limited to specific groups, ages, or individuals.

The above claims should serve primarily a single purpose: to protect us to a sufficient degree from legal elitism which is frequently advocated in relation to the issues of legal interpretation. In other words, as the interpreters of a legal document, we must not succumb to the following views that attempt to smuggle in our conversational arguments the illusion of a legal certainty or irrefutability: ‘lawyers must be best informed of the subject,’ or ‘judges tend to accumulate such an amount of interpretive experience that it makes no sense to argue against them in the matters of legal interpretation.’ All such claims are instances of a legal quasi-wisdom that normally tries to shield some dogma from critical questioning and

3 For more detail concerning my views of interpretation, see Pehar (2006b; 2011b; 2011c; 2014a; 2014d, 107-146).

counterarguments; we stand always under the commitment of assessing all legal propositions, including interpretive ones, in light of the generally applicable epistemological and logical-semantic standards. Additionally, all legislators are duty bound to adhere to a principle that indicates a very inimical attitude to the legal elitism in the matters of legal interpretation: laws must be written in a language that is clear and understandable to all citizens. You must not indict someone on the basis of a code of law that is not understandable to him or her. Hence, the same proposition must apply to the issue of interpretation.

That is why legal interpretation must be fundamentally open and accessible to all those concerned with it in any way, and that is why legal interpretation must be maximally 'liberal' and open to all viable criticism and counterarguments. However, we need to keep in mind that the language-related considerations are not exclusive ones: legal interpretation must be open to a legitimate input by anyone also because it is so inextricably tied to political and, more importantly, ethical theories and considerations. Law stands in close relation to the issues of morality and politics, hence also with general anthropological themes and concerns. As such theories, considerations, themes and concerns are of general interest to everyone, it would be both meaningless and counterproductive to pose the claim that, on the issues related to law, some legal and properly schooled experts are the only ones capable of passing a reasonable judgment. One should, for instance, keep in mind that creative writers were able to present, and propose solutions to, moral dilemmas that characterize our common ethical and legal practice, hence they cannot be excluded in their role of moral, and therefore legal, experts and road-paving authorities.

After having discarded legal elitism in the matters of interpretation, we should say a few important words about the very process of interpreting, both of a general and a legal nature. First and foremost, in this essay one kind of interpreting will not be of concern to us: it is the kind of interpretation we commonly relate to the no-

tion of the 'reading of poetry.' Sometimes, the goal of interpretation, as sanctioned by a certain context, is not to establish a single and to all binding meaning or to construct a key and primary meaning of a document. Sometimes the process of interpreting aims at enlarging the space of interpretation, not narrowing it as it should be, or at multiplying the meanings, not reducing them to a true one. One should also keep in mind that some poets relate to their own poetry as if it is a means of infinite multiplication of meanings. And they relate to their interpreters as if the latter should serve as partners in creation of ever richer and increasingly complex poetry. Keep in mind John Lennon and his 'I Am the Walrus.'

As Pelikan emphasized, legal interpretation is of a different kind; it is like the interpretation of the Bible. In the case of interpretation as a legal task, the interpreter deems his interpretation to be a rational process guided by a single goal: to establish an actual meaning of a text that is taken as authoritative and binding on all the readers of the document, the Bible or a constitution (Pelikan 2004). In such a context, the outcome of interpretation is offered to those who feel that they are bound by the document, by the believers or the citizens who adhere to a single constitution. This then means that the process of interpreting in this context is actually closest to the process of interpreting as we found it in the cases of the quotidian communication and interpretation—whenever we interpret the utterances of our interlocutor, we assume that they carry a single and specific meaning, and we also assume that the interlocutor should be the key authority in establishing what s/he intended, or meant, to say. Of course, in the case of the Bible and the constitutions, we cannot rely on a single interlocutor as a primary authority; normally, a group or a collective person is a proper author of that kind of document. Hence, often the proper meaning must be determined by the means of negotiation between the actors who play the role of various original drafters/writers of the documents.

Now, assuming such premises, what is the process of interpretation, and what are its essential components? Let us take a sim-

ple example: in a text we read the sentence 'John is chasing a dog with a stick.' As it stands, the sentence is ambiguous. Following the reading, we may envisage John as he carries a stick and runs after a dog; or, we may envisage John as running after a dog which holds a stick in its mouth. Of course, the use of a comma would help with such cases of the lack of clarity, but in some languages commas (or similar punctuation marks) are not used, and even if they are, it may not increase clarity. For a moment, let us imagine that the sentence is written as I related above, and that the reading of it results in a conundrum: it's not clear how we should strictly interpret the string of words. This already tells us something important about the process of interpreting. The process is motivated by a need, by one's encounter with an unclear condition. The need to interpret is not omnipresent, or perennially sensed, and if such a need were pressing on us all the time, it is very unlikely that we would be in position to formulate any interpretation since we would be in the dark about everything all the time.⁴ Hence, the conditions that are problematic meaning-wise do not emerge everywhere and always; in fact, they emerge with such a low frequency that we can, in a majority of cases, draw on the fund of nonproblematic information, beliefs, or meanings on the basis of which we then construct a meaning.

Let us return now to the simple example. What does its interpretation amount to? It amounts to the fact that, after our confrontation with the problem, we seek some additional information that could help us form a clear view of the meaning of the given sentence. In other words, we proceed as those working on a puzzle: we search for some additional pieces that could fill the image which presently remains incomplete. The most important demand on us is as follows: the information gathered must be sufficiently safe and reliable, and also cohere with the rest of the image, for which the

4 Hence, Vattel's famous rule of interpretation (*'in claris non fit interpretatio'* [when the matters are clear, interpretation is not required]) comes first.

primary condition is in the relevance of the information to the given image. As to our specific example, this means that we will be seeking some additional information on John and his dog. Where do we find such information? We find it wherever we think we should search for it, and normally we will search for it in three key blocks that I tend to designate as ‘indices of interpretation’ (like an index of names or subjects in a book): context, intention, and ordinary/conventional meaning of the word.

For instance, we will try to gather the preceding parts of the text (of which the sentence on John and his dog is a part), and what it claimed there about the dog or John. In this case we will draw on the context and search for the data relevant for the understanding of both John’s intentions and the author’s intentions. For instance, if the text has already read that John was eager to punish the dog, this could mean that John, not the dog, carries the stick. And, if it has already read that the dog somehow got hold of the stick, then the interpretation could deliver a different result. For the purpose of interpreting, the context should be considered in the widest possible sense: it includes the text within which the sentence is expressed, but it also includes all the parts of the world that are relevant to the said sentence. As to the second ‘index of interpretation,’ intention should be here taken as the intention of the author of the sentence—what did the author intend to do with the said sentence. Of course, again we will need some glimpse into the context to answer the question of intentions. Third, and lastly, we need to deal with ‘conventional meanings’—this is an assumption of the common sense: whenever we interpret, conventional meanings are those that should cross our minds first. This, of course, does not imply that unconventional uses of words or sentences are forbidden, but for such a use, and for the interpretive hypothesis of such a use, we need some special, additional reasons.

I will now present an example to demonstrate the extent to which our information on the very author of a pattern of language can critically influence our interpretation of the pattern. There is

one idiom in the English language: 'I have butterflies in my stomach.' Every normal speaker of the English, whenever s/he uses the sentence, intends to convey to us that s/he feels some tremor in his or her stomach due to her, or his, state of a slight nervousness or excitement. In other words, the use of such an idiom implies only that the speaker is slightly nervous. It does not imply the belief that butterflies fly within the speaker's stomach, or are about to fly out through the speaker's mouth. This also means that, at least in this idiom, the word 'butterflies' is used unconventionally, as a picture, simile or metaphor.

However, let us now change radically our assumptions. Imagine that we deal with a psychotic speaker who means the idiom literally. S/he really believes that s/he has got butterflies in her or his stomach. In other words, imagine that the speaker means the sentence literally. Also, imagine that we have good reasons to believe that the speaker means it literally, not as an idiom. Our interpretation of the sentence will, under such assumptions, change radically, too. Hence, the view we hold of the speaker, which includes his or her many intentions, beliefs, desires, ambitions, hopes, fears, etc., necessarily influences, or shapes, our understanding of his or her sentences and their meanings. In other words, the sentences are normally interpreted holistically—we interpret them as parts of some bigger, implicitly and tacitly held wholes (composed of beliefs and desires, roughly).

It is on many occasions that Donald Davidson illustrated pertinently the holistic nature of the process of interpretation. However, one should immediately understand that the thesis of holism involves much more than the demand that we interpret the patterns of language within their contexts. Davidson intended to emphasize the fact that, in reality, we never interpret singular or individual sentences; we always take them in clusters and treat them as, more or less complex, narratives.⁵ One of the examples Davidson used is

5 For more detail on Davidson's views of interpretation, see Pehar (2011c, 146–147, 165–167).

approximately as follows: 'Paul said that he saw a spider in his girlfriend's bedroom.' Whenever we interpret this sentence, we are bound to interpret tacitly many parts of Paul's language. For instance, we cannot interpret this sentence in the usual way without attributing to Paul many additional sentences on, e.g., spiders, girls, and bedrooms. Assuming that Paul means by 'spiders' some special parts of the engine of his automobile, we lose the capacity of interpreting the said sentence in the usual way, in its conventional meaning. Now, keep in mind that this example carries another implication. As Davidson used to emphasize frequently, as the users and interpreters of language, we cannot divorce the process of the attribution of beliefs to a speaker from the process of the attribution of meanings to the same speaker. In order to interpret the speaker correctly, many sentences s/he utters must be not only understandable, but also acceptable to us: we need to share many beliefs with the speaker. In some cases where the interpretation yields a result in which the speaker's utterances are taken as wrong or false, our interpretation of his or her beliefs must issue in an understanding that the beliefs are at least rationally motivated or acceptable in some realistic perspective. For instance, let us assume that Paul does not believe that spiders are tiny animals that normally spin webs and look suspicious. Such an assumption would prevent us from understanding the meaning of Paul's utterance.

Additionally, and importantly, the impact of beliefs is shown not only at the level of the psychological interpretation of the speaker to whom we attribute certain beliefs to give a plausible interpretation to his or her language. It is also shown in the fact that, whenever we interpret, we in fact search for correct, safe, and reliable information that can be of help to us in a certain context. In cases where we encounter false information, our interpretations are false, too. Hence, it is clear that, when one gives substantial evidence in support of the thesis that our interpretation is based on erroneous beliefs, we will have to withdraw our interpretation and modify it to a significant degree.

The emphasis on the significance of the ‘belief’ factor for the process of interpreting has three key consequences. First, as a matter of principle, we cannot know in advance which beliefs are worthy of holding or accepting for the purpose of a specific interpretive task. We are limited on one side by our fallibility and, on the other, by our creativity. Second, the transformations in our belief system are essentially unpredictable and not describable by an algorithm or through a set of unambiguous rules. This especially pertains to the process of interpretation to the extent it depends on our discovery or construction of new beliefs.⁶ For instance, keep in mind that the traditional hermeneutics made a bold attempt to describe the process of interpretation algorithmically, through the so-called ‘canons of interpretation.’ However, all the attempts to give a more determinate meaning to the canons, or to present them in the shape of strict and precise legal regulations, failed (Hirsch 1967). Contemporary legal hermeneutics made a similar attempt in the international arena. As a part of the process of the drafting of the Vienna Convention on the Law of Treaties, which includes two principles of legal interpretation (Articles 31 and 32), the International Law Commission attempted to reduce the process of legal interpretation to a number of hierarchically ordered rules that should be successively triggered to yield an unexceptionally unambiguous result. However, such an attempt failed, too. Articles 31 and 32 are open to radically different interpretations; this means that, instead of reducing the ambiguities of the international treaties, they in fact reproduce such ambiguities as a part of the outcome of the legal interpretation.⁷ The causes of such a reproduction are found primarily in the creative character of legal interpretation, which reflects the creative nature of the process of acquisition or formulation of the beliefs relevant to the process of interpretation.

6 In 1857, Sedgwick claimed as follows: ‘It would seem as vain to attempt to frame positive and fixed rules of interpretation as to endeavour, in the same way, to define the method by which the mind shall draw conclusions from testimony’ (quoted in Hirsch 1967, 202).

7 This argument is elaborated in more detail in Pehar (2006a).

As a part of the second provision, due to the creativity factor, it is important to emphasize that, in the sense of its epistemological dimension (Articles 31 and 32 relate explicitly only to the semantic dimension), i.e., as a method, the process of interpretation should be viewed as an abductive kind of reasoning, that is, as the ‘inference to the best explanation’: it is a creative formation of a hypothesis that explains a relevant set of data in the simplest and clearest terms. Hence, the process of legal interpretation cannot be viewed as an inductive generalization, or as reasoning from particular data to a statistical generalization, nor as a deductive kind of reasoning according to some deductively valid schemes of inference.⁸

Lastly, as a third consequence of the emphasis on the significance of the ‘belief’ factor for the process of legal interpretation, the debates concerning beliefs, either political or legal or moral, are those that produce the most interesting, and the gravest, cases of interpretation-related dilemma. Occasionally, we will find it enormously difficult to adjudicate between beliefs, or, as usually said, the conflict between beliefs will be deemed undecidable, which will then prevent us from attributing an unequivocal content to a proposition or a text. Conversely, this also means that, in the condition when we are in a position to formulate the most plausible beliefs, and demonstrate that a fund of beliefs is, under the standard epistemological norms, unequivocally superior to another fund, our interpretation is highly likely to assume a definite, unequivocal shape under the influence of the superior fund. This means that an accurate, or adequate, interpretation has one goal only, and can be recognized only by one feature—it does not leave room open for further, justifiable and pending disagreements concerning some further beliefs, including both explicit and implicit ones. This means that, once it arrives at the conclusion that A means X, Y, and Z, a proper and adequate interpretation cannot be put into question by inviting some further, and reasonable, disagreements between our beliefs concerning X, Y,

8 Eco (1991), too, advocates the view of interpretation as an abductive kind of reasoning.

or Z, the beliefs that only appeared to be taken for granted, or shared, during the process of interpretation. The same claim can be presented in a metaphorical way: an accurate interpretation is like an interpretation founded on some supreme, unwritten law, on the 'law, and right, of nature' that cannot be denied, opposed, or violated.

Aristotle was the first to propose such a view of interpretation (Aristotle 1959, 1374a25–35), which can also be found in Cicero, who emphasized that, as a part of the argument in support of one's interpretation, one needs to prove that the interpretation is 'fair/honest, or useful, or necessary [*honestum aut utile aut necessarium*]' (1949, II xli. 119, p. 288). Lon Fuller recovered such a view of interpretation in the twentieth century and stood unambiguously for the tradition of 'natural law.' He pertinently emphasized that 'those whose fate in any degree hinges on the creative act of interpretation ... as well as those who face the responsibility of the interpretation itself, must wish that it should proceed on the most secure footing that can be obtained, that it should be grounded insofar as possible in the necessities of democratic government and of human nature itself' (Fuller 1969, 102).

All the aforementioned features of the general process of interpretation have their place in the legal kind, too. Hence, every legal interpretation should be viewed as a process in which we seek some additional, safe and reliable information that can help us explain a pattern of language, a code of law or a constitution, in the most reasonable and clearest terms. Also, each legal interpretation is a creative act which to a large extent depends on the human ability to formulate relevant beliefs, and it is an act rationalizing the pattern of language, which is the topic of interpretation. One should also emphasize another matter that is frequently neglected or minimized in importance: the act of interpretation needs to reduce, not reproduce, ambiguity, and help one draw an image which is clearer than the image which motivated the need, and thus prompted the act, of interpreting in the first place. In other words, we should not interpret an unclear message by another unclear message. Additionally, interpretation itself is

geared to a construction of a narrative as a complex net of propositions which needs to satisfy all the key epistemological standards (including coherence, justification, empirical validity, parsimony).

As to legal interpretation, we should add three more aspects. First, whenever we deal with legal ambiguities, we should bear in mind that a collective agent stands behind a legal text; in other words, a legal text should be interpreted and clarified in light of the collective, not individual, intentions. Second, our interpretation needs to assume that the law is just or that it involves at least an attempt to right an injustice. This means that, if a legal interpretation promotes an unjust structure in light of the intentions of the agents who took part in the process of formulating of the law, or the constitution, this *prima facie* speaks against such an interpretation. It fails to explain why the agents initially deemed the law, or the constitution, purposeful, or right and beneficial, as they obviously have.

The English interpretive practice recognized this notion long time ago and formulated it explicitly: whenever we seek a proper interpretation of a law, we start with the assumption that the collective agent formulates or adopts the law in the state of need; in other words, we assume that the collective agent is faced with a problem of which there was no solution at the time prior to the passage of law; then the law was formulated in such a state in order to find a cure for such a condition, or to resolve the said social-legal problem. Hence, the true purpose of interpretation is to identify the cure and, once it is explicitly identified, to apply it to the condition in which the law requires some interpretation. This means that interpretation needs to express, not deny, the cure that the law brings to a society. Here is how the Barons of the Exchequer accounted the process when they met in 1584 to consider the difficult problem of interpretation in 'Heydon's Case':

And it was resolved by them, that for the sure and true interpretation of all statutes in general ... four things are to be discerned and considered:

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
- And, 4th. The true reason of the remedy;
and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy. (Fuller 1969, 82-83)

Third, and finally, we should bear in mind another aspect of legal interpretation with which we return to the opening lines of this essay. Every legal interpreter undertakes the commitment to offer some valid and persuasive reasons in support of his or her interpretation. Every legal interpreter is duty bound to explain why his or her interpretation ought to be deemed epistemologically superior to some alternative interpretations, and his or her explanation must rely only on some fully impersonal considerations persuasive to all the speakers of a language, or at least to those who think that they ought to adhere to a constitutional structure. Also, every legal interpreter must be in a position to explain why s/he views the alternative as flawed, and why the alternative entails some consequences that should not be accepted. Summarily, this means that the work of legal interpretation is actually a work in the construction of theory: the interpreter makes an attempt at formulating a theory which offers an explanation of a *prima facie* puzzling part of the universe; a part that is contained in a proposition, or a text, by a speaker or a group of speakers.

Now, as the interpreter's work is primarily in the field of theory, s/he must not be *a priori* protected from some plausible objections. First, the work must not be protected through the status of the institutional body. The scientists who debate an issue in solid-state physics should never claim that an instituted scientific committee has the right to decide between competing theories. They are ex-

pected to try to resolve a dispute by the means of argumentation only, or admit that the problem, at the present stage of theoretical development, should be qualified as irresolvable and open widely to competing explanations. The same holds for the domain of legal interpretation, including the area of constitutional hermeneutics or constitutional theory. There is no way that one can protect a constitutional court from a counterargument by defining its decisions *a priori* as infallible or perfect, and thus as ultimate and irrevocable.

We should also firmly keep in mind that no court has ever managed to make its unjust, or clearly implausible, decision immune to counterargument by drawing on its own quasi-status or role as an ‘ultimate interpreter.’ And whenever a court tried to do so, the conditions worsened considerably and the society in question suffered a polarization much worse than it was prior to the passage of the—unjust and implausible—interpretive decision. Hence, when we address the topic of interpretation, the status of a constitutional court should be deemed provisional and conditioned: it will depend fully on the strength of its arguments, that is, on the quality of its theoretical work.

In other words, when it comes to some really hard cases of critical constitutional interpretation, the courts’ status follows their performance, not the other way around. The former does not guarantee the latter, and cannot guarantee it, primarily because every process of interpretation is guided by reasons and argument, not by personal preferences, the party or ethnic interests, or the currently prevailing ideologies or the relations of political power.⁹ However, on the other hand, many a court seems to have gladly succumbed to the following challenge: to invoke the pretence of infallibility and exploit the legal interpretation as a cover for steering the meaning of a law, via an arbitrary interpretation, in a direction which suits some dominant party.

9 For a more detailed argument in support of such a theory of the status of constitutional courts (when it comes to constitutional interpretation), see Pehar (2014a; 2014d, 132–146).

Let us look now into the BiH Constitutional Court decision of 1 July 2000, which was in many ways a critical juncture of the developments of the post-Dayton relations within BiH.

Part 2

Now, how was the BiH Constitutional Court decision of 1 July 2000 (hereinafter referred to as U 5/98-III) formulated, what is its impact, and what kind of interpretation of the Dayton Constitution does it offer?¹⁰

On 12 February 1998, Alija Izetbegović, the then Bosniak-Muslim member and chair of the BiH Presidency, issued an appeal to the BiH Constitutional Court. In his application Izetbegović demanded that the Court review and declare many provisions of both the Republika Srpska (RS) Constitution and the BiH Federation Constitution unconstitutional in light of the Dayton BiH Constitution.¹¹ Izetbegović's list is not short and it includes, among others, the following provisions of the (then) RS Constitution:

- a. The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;
- b. Article 1 which provides that the Republika Srpska is a State of the Serb people and of all its citizens;
- c. Article 2, Paragraph 2 to the extent that it refers to the border between the Republika Srpska and the Federation;
- d. Article 4, which provides that the Republika Srpska may establish special parallel relationships with the Federal Repub-

¹⁰ My references to the decision follow BiH Constitutional Court (2000).

¹¹ For the text of the Dayton BiH Constitution, I rely on the document on the website of the Office of the High Representative (Constitution of Bosnia and Herzegovina 1995).

lic of Yugoslavia and its Member Republics, and Article 68, Paragraph 1 which, under Item 16, provides that the Republika Srpska shall regulate and ensure co-operation with the Serb people outside the Republic;

- e. Article 6, Paragraph 2 to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;
- f. Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language.

As to the BiH Federation constitution, Izetbegović's application enlists the following provisions as, in his view, contrary to the Dayton Constitution:

- a. Article I.1 (1) to the extent that it refers to Bosniacs and Croats as being the constituent peoples of the Federation;
- b. Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;
- c. Article III.1 (a) to the extent that it provides for the authority of the Federation to organize and conduct the defence of the Federation.

For a start, one should notice that Izetbegović was not appealing about a trifle, nor did his application deal only with a slight terminological harmonization of the entity constitutions' provisions with the Dayton Constitution. For instance, it is immediately clear that the provision of the RS Constitution that deals with the status of RS as a 'state' is not harmonized with the Dayton Constitution primarily in a terminological sense. Officially, RS is not designated as a 'state,' but an 'entity,' to which some important attributes of the state were ascribed by the Dayton Constitution, e.g., police affairs ('law enforcement') and even the capacity to form special relations with the neighboring states. Also, it was clearly stipulated that there should be an interentity boundary line, which should be marked. However, RS was not defined in the constitution as an in-

dependent state comparable to Germany, Italy, or France, but as an entity. Additionally, it is clear from the second part of Izetbegović's application, one that deals with the Federation constitution, that his appeal is not primarily related to the notion of 'statehood,' but to the status of 'BiH Serbs' as a constituent people primarily within RS. Izetbegović's appeal implies that he considers the connection between constituent peoples, on the one hand, and the individual entities, on the other, as unconstitutional, that is, as irreconcilable with the letter and intention of the Dayton Constitution.

Now, what was the fate of Izetbegović's appeal? In 1998 and 1999 several public hearings were held.¹² They served a dual purpose: to clarify and justify the tenor of Izetbegović's appeal, and to elaborate and justify the positions of the other parties to the appeal, RS and the BiH Federation. For instance, Kasim Trnka, a Sarajevo professor of law, served as Izetbegović's spokesman at those hearings. On behalf of RS, the RS Assembly representatives, Professors Kunić and Lukić, were heard, while the Federation parliament representatives were heard from both chambers: Bosniak-Muslim representatives from the lower house of the parliament, and Mato Zovko and Ivan Bender, two Croats, as representatives of the upper house.

Following the hearings, the Court moved to formulate their opinion in the case; by the time of the first partial decision, 30 January 2000, five sessions of the Court had taken place. We should immediately notice that this is a large number, probably symptomatic of some disagreements within the Court and also attesting the controversial nature of Izetbegović's appeal itself. The first partial decision by the Court simply confirmed that Izetbegović's appeal was admissible. Two more partial decisions were made, one on 19 February 2000, which is not as important and far-reaching as the third (U 5/98-III), which is the topic of this analysis. Interestingly, two more sessions were held at the court after the February 2000 decision, on 29 and 30 June 2000,

12 BiH Constitutional Court (2000) also contains brief reports on those hearings and quotes from the legal representatives' opinions.

attended by all the representatives except Ivan Bender and Mato Zovko. Following the sessions, the Court published the U 5/98-III decision, while a day before the publication High Representative Petritsch met behind closed doors with the international judges of the Court.

What was the essence of the sessions and debates both before and within the Court? Following the adoption of the Dayton BiH Constitution, a predictable conflict over the meaning of the constitutional provisions started taking place. The conflict may be pictured in many different ways; however, one simple matter is clear to everyone: the conflict of interpretations should be viewed as a continuation of war by other means. Now, what is the pivotal point, or the driving issue, of the conflict? It must be in the question of the key intentions as expressed in the Dayton Constitution, and also of the key reason why the parties to the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP) adopted the agreement including its central document, BiH Constitution, as Annex 4. In June 1998 the weekly *Svijet* published an interesting parallel interview in which Kasim Trnka and Petar Kunić, a Bosniak and a Serb lawyer who will play the key roles in the hearings preparatory to the U 5/98-III decision, voiced their opinions on the GFAP (Kunić and Trnka 1998). A very brief and superficial glimpse into the interview can confirm that the two disagree over all the fundamental questions concerning the Dayton Constitution, and a sound assumption can be made that the disagreement between the two was a reflection of a deeper disagreement involving the entire political elite of BiH and marking, and reinforcing, a clear interethnic polarization: the Croat and Serb BiH elite subscribed to one pole of interpretation, whereas the Bosniak-Muslim elite subscribed to the opposite one.

Hence, Trnka and Kunić viewed the BiH Constitution in opposed perspectives. While to Kunić the Dayton Constitution defines BiH as a federation with strong confederal elements, one which resulted from an international treaty between the entities that existed prior to the treaty, to Trnka the constitution defines a state which has temporarily self-transformed in order to end a war. According to Trnka,

a day after the adoption of the constitution, the state needed to start a progressive self-recovering in the sense of the reconstruction of its inner sovereignty, i.e., its transformation into a nonfederated state that might even rebuild its own armed forces. Obviously, the two posed irreconcilable claims. Interestingly, the two assumed some explicit views of the process of interpretation of the GFAP as well: Trnka objected to Kunić that the latter's interpretation was insufficiently holistic, whereas Kunić replied that his own interpretation was nothing but literal. However, in the parallel interview, neither Trnka nor Kunić offered their reasons in support of their interpretation, which is a shortcoming of major proportions. Now, the interview may serve as a good background story for a better understanding of the U 5/98-III decision. The ruling made an attempt not only to adjudicate on Izetbegović's application in relation to a number of provisions of the entity constitutions, but also to settle the key issue: How should one interpret the BiH Dayton Constitution?

Before offering my own analysis of the ruling, I should add a few more words about the process of debating prior to the announcement of the ruling. The very text of the decision clearly indicates that the representatives of various parties adhered to their ethno-political loyalties or sympathies, but this does not exclude, or weaken, some rational aspects of their argumentation. Perhaps most importantly, the representatives of the BiH Federation Parliament did not speak with a single voice. One of the paradoxes of this case is the fact that the Croat component of the BiH Federation actually advocated views strikingly similar to the views proposed by the experts who spoke on behalf of the Republika Srpska Assembly. For instance, Paragraph 46 of the U 5/98-III decision cites the view of the Croat representative from the BiH Federation House of Peoples as follows:

The representative of the House of Peoples of the Federation Parliament repeated his objections regarding the admissibility of the present request also in relation to the function of the Dayton Peace Agreement. He stated that a review of the Constitu-

tions of the Federation of BiH and the RS would lead to a total revision of the Dayton Agreement. The basic goal of the GFAP in its present form, which has been accepted both by the RS and the Federation of BiH, was in fact to secure peace in this region. Furthermore, he concluded: 'The constituent status of all three peoples in both Entities would return Bosnia and Herzegovina to its position in 1991 when all of them had been constituent according to the former Constitution of BiH. It is not necessary to repeat how this ended.... The applicant seems to forget what has happened in BiH during the eight years which have passed since.'

Contrary to such a view, the Bosniak representatives of the BiH Federation House of Representatives at a hearing expressed their own views fully in line with the views expressed in Izetbegović's application, as follows:

According to the written statement of the People's Assembly of the Republika Srpska, the Constitution of BiH itself establishes the RS as the electoral unit for the Serb member of the Presidency and for the five Serb delegates to the House of Peoples of the Parliamentary Assembly of BiH. These provisions guarantee the equality of Serbs in relation to the other two nations, whose representatives in the same bodies are elected from the Federation of BiH and not from the RS.

In response to this statement, the representatives of the applicant and the House of Representatives of the Federation Parliament contended that exactly those provisions of the Constitution of BiH guarantee the constituent status and thereby the equality of all three peoples on the entire territory of BiH since they are equally represented in those institutions whose power is exercised on the entire territory of BiH. However, the electoral mechanisms for these institutions were of a technical nature only. (U 5/98-III, paras. 41 and 42)

In other words, the decision of 1 July 2000 concerns an extremely polarizing issue. The parties to the proceedings, including the applicant and all the representatives of the entities, assumed opposed and irreconcilable views of the problem of a proper interpretation of the Dayton Constitution; hence, an unequivocal decision by the Constitutional Court had to take one or the other direction, which means that any court decision was bound inescapably to destabilize the relations, and ultimately this was indeed the case. However, there was a way to resolve the conflict in a different way, through a different method, which those in the positions of ‘international’ power never considered, or never tried with a sufficient seriousness.

Another aspect is worthy of emphasizing: U 5/98-III may be separated into two conceptually distinct parts, or elements. One element is put at the very beginning of the decision. It is the operational part, the immediate legal impact, or conclusion, of the decision. In this case, U 5/98-III declared two provisions of the entity constitutions unconstitutional (i.e., invalid in light of the Dayton Constitution of BiH as a state):

A. Regarding the Constitution of the Republika Srpska:

The Constitutional Court declares the following provisions or parts of provisions unconstitutional:

- a. Paragraphs 1, 2, 3 and 5 of the Preamble, as amended by Amendments XXVI and LIV.
- b. The wording *a State of the Serb people and* of Article 1, as modified by Amendment XLIV.

B. Regarding the Constitution of the Federation of Bosnia and Herzegovina:

The Constitutional Court declares the following parts of provisions unconstitutional:

- a. The wording *Bosniacs and Croats as constituent peoples, along with Others, and* as well as *in the exercise of their sovereign rights* of Article I.1 (1), as modified by Amendment III.

However, the other element of the decision is much more important: it is the remaining part of the decision spread through its 42 pages, a part which provides a justification of the decision. This element proposes some reasons that give support to the operational part or element. A court may say that a provision is nil, or invalid, which simply means that the provision should cease to have a legal effect, and be replaced with another; but, the argumentative/explanatory element is much more important because it places some future limits on the conduct of those concerned with the decision in their legislative role. In our case, the argumentative part is of major importance also because it indicates the character of the future provision(s) that should replace the invalidated one. However, I will here immediately take note of the following fact; the Constitutional Court could have justified their decision by the following statements: 'RS is defined as an entity'; 'Bosniaks and Croats should be taken as constituent peoples both to the entity and the state of BiH'; and 'the Dayton Constitution does not provide for sovereign rights of the constituent peoples.' For the purpose of the case, such statements would have sufficed. However, the BiH Constitutional Court, which here means primarily its international part together with its Bosniak-Muslim judges, decided to move to a different direction. The court decided to endorse the key rationale of Izetbegović's application. Both foundations and effects of the decision will be scrutinized in the remaining parts of this essay.¹³

3.1 Interpretive crux of the U 5/98-III decision and its cognitive-interpretive flaws

The crux of the U 5/98-III decision is explained in Paragraphs 59 and 73. Paragraph 59 stipulates as follows:

¹³ See also Aparicio (2009, 141–146).

Even if the constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats, and Serbs as constituent peoples by the Constitution of BiH can only mean that none of them is constitutionally recognized as a majority or, in other words, that they enjoy equality as groups. It must therefore be concluded, in the same way that the Swiss Supreme Court derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups, that the recognition of the constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II.3 and 4 of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities.

Paragraph 73 stipulates as follows:

Indeed, from a functional point of view, the Dayton Constitution is part of a peace agreement as the name 'General Framework Agreement for Peace in Bosnia and Herzegovina' clearly indicates. Thus, as it may already be seen from the wording of Article VII of the GFAP and Paragraph 1 to 3 of the Preamble of the Constitution of BiH, 'peaceful relations' are best produced in a 'pluralist society' on the basis of the enjoyment of human rights and freedoms and, in particular, through the freedom of all refugees and displaced persons to return to their homes of origin as guaranteed by Article II.5 of the Constitution of BiH. Moreover, this provision also refers explicitly to Annex 7, which in Article I *expressis*

verbis states that ‘the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.’ It therefore follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and, thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination.

In other words, in the part that supplies justification, the BiH Constitutional Court sides explicitly with the political-legal rationale of Izetbegović’s application. However, in the third section of this essay, we will see that such a characterization of the U 5/98-III decision meets an insurmountable obstacle in a procedural sense. For now, it is clear that the Constitutional Court seems to endorse Izetbegović’s key notion: that the entities are inherently multiethnic; second, that the constituent peoples are equally constituent throughout BiH territory; and, third, that the necessity of nondiscrimination between constituent peoples within the entities as well follows from such premises. Additionally, it transpires from Paragraphs 86–95 (the relations within RS) and 130–139 (the relations as found within the BiH Federation)—those address the issue of refugee return to the entities—that, through U 5/98-III, the Constitutional Court seem to clear the road for a soon expected return of the ‘nonminority’ constituent peoples to the entities from which they had to flee; and they also seem to clear the road for a postreturn transformation of the entities into *de facto* multiethnic units that cannot be mutually differentiated. This is very unambiguously indicated in the last proposition of Paragraph 73.

What is the basis of the Court’s interpretation of the BiH Constitution? Looking into the essential factors of legal interpretation as explained in the first part of the essay, it is clear that the Court’s reasoning is founded on some erroneously presented, or irrelevant, facts. We should place emphasis primarily on the following: when-

ever one interpret an agreement, and the Dayton Constitution is a part of an agreement, one need to consider some information that clarifies, in historical terms, the process of adoption of the agreement, or the history of agreement making. The BiH Constitutional Court published their decision on 1 July 2000 by which date the memoirs of the key actors of the Dayton negotiations, Richard Holbrooke and Carl Bildt, were already published (Holbrooke 1999b; Bildt 1998). The Court makes no mention of, and thus gives no consideration to, those valuable documents. For instance, Holbrooke's book contains a very clear, honest, and telling description of the reasons for which Izetbegović endorsed the skeleton of the constitutional structure of the post-Dayton BiH, and it gives a clear account of the way in which Holbrooke presented the key contours of the Dayton compromise to Izetbegović (Holbrooke 1999b, 96–97). However, the BiH Constitutional Court in the U 5/98-III decision shows no sign of its appreciation of the historical data Holbrooke presented. This is obviously one of the major flaws of the decision because the historical information of the kind offered by Holbrooke or Bildt could help us formulate more reliably our interpretation of the tenor of the Dayton Constitution and of the purposes in light of which the very parties construed the wording of the agreement.

Furthermore, the Court fails to take into account some additional and valuable sources of information. For instance, it does not give consideration to the comments on the Dayton Constitution that Izetbegović passed and published prior to the U 5/98-III proceedings. Izetbegović said many things about the Dayton compromise in both 1996 and 1997, but the BiH Constitutional Court found them of no interest in formulating its interpretation of the key purposes of the compromise. For instance, in a November 1996 interview Izetbegović sent the following message primarily to the Bosniak-Muslim constituent people of BiH:

I already said that, in Bosnia such as it is, we are forced to choose between a division of territory, on the one hand, and a division

of rule on the other; or, more precisely: either a full sovereignty in a divided Bosnia, on a part of its territory, or a divided sovereignty in the whole of Bosnia. The option of a full Bosniak rule in the whole of Bosnia is impossible. I say this to our people so that they find it easier to cope with those frictions over the issue of division of responsibilities in the BH government or in the BH Federation government. (Pehar 2011a, 145)

Undoubtedly, this is a cognitively valuable comment, but the Court seems to have shied away from giving an account of such, or other, historically relevant considerations. Additionally, there is a document to which many UN Security Council resolutions on BiH refer, and which is of critical importance for understanding the role and status of the constituent peoples in the Dayton Constitution; but again, the BiH Constitutional Court makes no use of the document in the U 5/98-III decision: the document concerned is the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina (DAIF), which was the second international treaty signed during the Dayton talks.¹⁴ In other words, measured by the standards of historical analysis, which unavoidably plays an important role in legal hermeneutics,¹⁵ the U 5/98-III decision is flawed and unfounded.

However, that is not all. U 5/98-III is not only divorced from the relevant historical documents; even worse, it is founded on fabricated, or manipulated and corrupted, historical data. For instance, in March 1994 Izetbegović must have realized that the BiH Federation was constituted by two constituent peoples of Bosnia, not three (see Washington Agreement 1994). According to the considerations from Chapter 2 above, his realization must have been also reinforced by the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina signed at Dayton on November 10 1995. In light of

¹⁴ See Chapter 2.

¹⁵ How could we understand the relevant intentions of some collective agents if not through some historically scrutinized discursive products, such as documents, texts, statements, and similar expressions and embodiments of such intentions?

those historical facts, it makes no sense to assume that Izetbegović accidentally forgot to add the Serbs as the third constituent people of the BiH Federation, or that he believed that he, or anyone, could convince the Serbs to endorse the status of a constituent people in the BiH Federation, too, despite the fact that their representatives have not partaken in the constitution of the entity.¹⁶ Such an assumption is so irrational that one should not add it to his or her legal interpretation. Now, in 1998 this is clear both to Izetbegović and to the BiH Constitutional Court. Besides, it is clear that this must pose an obstacle both for Izetbegović's application and for the Court's agenda. How can Izetbegović defend one view in 1994, and then in 1998 switch, with no explanation, to a different, radically opposed view of the status of Serbs within the BiH Federation? Finally, why should the Court accept Izetbegović's 1998 view as relevant, when the 1994 view was clearly one of the operational reasons in light of which Izetbegović adopted the Dayton constitutional structure for BiH? As to this conundrum, Izetbegović's expert Trnka came up with the following, very witty but also obviously manipulative, solution:

With respect to the meaning of signing Annex IV to the Framework Agreement by the representative of the Federation of BiH 'in the name of its constituent peoples and citizens,' the expert of the applicant argued that the previous existence of the Washington Agreement had established the constituent status of Bosniacs and Croats on the territory of the Federation. The formula given by the declaration was a result of the wish to secure by this signature the legal continuity of the constituent peoples from the Washington to the Dayton Agreement. (U 5/98-III, para. 35)

16 Actually, the Washington Agreement (1994, 3) addresses explicitly the issue of the Bosnian Serb constituent people in the following terms: 'The decisions on the constitutional status of the territories of the Republic of Bosnia and Herzegovina with a majority of Serb population shall be made in the course of negotiations toward a peaceful settlement and at the International Conference on the Former Yugoslavia.'

This solution, however, can be easily seen through, and it is also irreconcilable with the wording of DAIF; it is clear that the 'solution' cannot explain why Izetbegović did not 'secure the legal continuity' and constitutionality of the BiH Federation Serbs as well, and therefore it can be treated as a rhetorical, post hoc reshaping of Izetbegović's decision, which is irreconcilable both to the essence of U 5/98-III and to his very appeal to the Constitutional Court. But, we need to keep in mind that the Court, in fact, accepted such historical fabrications and manipulation of data and built it into the justificatory part of its decision. This means that, in the terminology of the first part of this essay, the U 5/98-III decision openly violates one of the basic tenets of valid and persuasive legal interpretation: it must not contain, or assume, false beliefs or unsupportable ad hoc hypotheses.

Every constitutional court must in its reasoning also rely on legal analyses or opinions by other courts. If such is the case, a court obviously needs to rely on the decisions of the other courts that are relevant to the case under consideration. The court also needs to draw explicitly on those parts of the decisions that are relevant to the case under consideration. An attentive reader, for instance, will notice that the BiH Constitutional Court, as a part of the U 5/98-III decision, refers three times to the 1998 decision by the Supreme Court of Canada: *Reference re Secession of Quebec*. However, first, it is clear that the said decision is not applicable to the issue the BiH Court considers in U 5/98-III. In the Canadian case, the problem is not one of an assessment of constitutional provisions at a lower level in light of constitutional provisions at a higher level. It is one of an assessment of admissibility of the motion to declare independence of the Quebec province. In the case of BiH, the BiH constituent peoples have already resolved a similar problem by having adopted the Dayton Constitution. The war and prewar period may be considered as one at which the issue of secession was indeed relevant to the BiH peoples.

Hence, my conclusion from this case is to the effect that the BiH Constitutional Court rhetorically invokes the Canadian case to pres-

ent itself in a favorable light, as a court staffed with knowledgeable legal scholars. This explains why the BiH Constitutional Court draws a conclusion from the Canadian case, which is so vague, in one interpretation, and so trivial in another, that one finds it very difficult to understand why a lawyer, or a legal scholar or political scientist, should decide to oppose it:

It is not by chance that the Canadian Supreme Court found in the case ‘Reference re Secession of Quebec,’ (1998), 2 S.C.R., at para. 64 that the Court must be guided by the values and principles essential to a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the human person, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. (U 5/98-III, para. 55)

Looking now at *Reference re Secession of Quebec* (Supreme Court of Canada 1998), we will recognize that it does contain a notion that could be applied to the BiH case. The Canadian Court states that it is not only that Quebec has a commitment to the remaining federal parts of Canada as a part of the initiation of the process of secession, a commitment to show respect to the federal parts and give consideration to their own opinion concerning its secession; the other parts, too, must, according to the Canadian Supreme Court, give serious consideration to a possible decision by Quebec and treat it as democratic and as a sincere manifestation of the will of the Quebec population. Following such a mutual recognition, the parties should, as the Court views it, start negotiations and thereby arrive at a conclusion acceptable by all. Most importantly, the Supreme Court of Canada shows awareness of an important matter by incorporating the following view in the text of its decision: ‘The negotiations that followed such a vote [for Quebec independence/secession] would address the potential act of secession as well as its

possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities' (Supreme Court of Canada 1998). In other words, it follows from this view that, if the BiH parties have indeed negotiated a solution to BiH-related issues, the solution should be considered primarily *per se*, not in light of provisions of an external law that the Dayton Constitution 'must have a priori incorporated.'¹⁷ We will see that this is relevant to the understanding of the Dayton Constitution and to the issue of constitutionality¹⁸ of the BiH peoples as well.

Hence, we can now conclude that the U 5/98-III decision of the BiH Constitutional Court violates a number of principles that every

17 The U 5/98-III reference to the 1998 decision by the Supreme Court of Canada is related to another curiosity. Following his mandate in Bosnia, Wolfgang Petritsch, in his public comments on Bosnia, roughly from 2005 on, proposed the view that 'The Dayton Constitution is a strait-jacket' (see, e.g., Pečanin 2010, 168-169). It is interesting to note that he probably chose the metaphor as a result of his familiarity with the 1998 decision on the Quebec Secession, and, of course, of his active role in the work of the 2000 formation of the BiH Constitutional Court. However, it is also interesting to note that the 1998 Canadian Supreme Court decision (Paragraph 150) actually states that 'The [Canadian] Constitution is not a straitjacket.' Furthermore, as I demonstrate in this chapter, it is not random that the BiH Court, despite its apparent reliance on the 1998 Canadian Supreme Court decision, negates one of the latter's key principles. The BiH Constitutional Court proposes an interpretation of the Bosnian Dayton Constitution that is arbitrary to such a degree that the only way to understand it is to pose the view that, through the U 5/98-III decision, the Court aims to modify completely the key terms and principles of the Dayton Constitution. Hence, Petritsch's 'straitjacket' qualification is extremely important—it indicates, first, that the US, and a good part of the 'international community' in Bosnia, views the Bosnian constituent peoples as 'madmen' (on which see more in Chapter 7.2), and, second, that the US, and the High Representative, do not feel bound by the text of the Dayton treaty. Finally, note that such an account of the Dayton Constitution in extremely negative terms is probably put forward to quasi-justify both American siding with Alija Izetbegović and US unsettling of the original Dayton compromise.

18 Some authors who are native speakers of the English language, for instance, Chris Bennett, use the term 'constituency (of BiH peoples)' as an abstract noun derived from 'constituent peoples of BiH.' I am, of course, a less fluent user of the English than Bennett, but still believe firmly that the noun 'constitutionality of peoples' is semantically more pertaining and more precise than the 'constituency of peoples' in spite of the use of the phrase 'constituent peoples' (not 'constitutional peoples') in the preamble to the Dayton Constitution. Furthermore, in my view, 'constitutionality of the peoples' means approximately the same as 'the constitution-making character/role of the peoples,' which also indicates that the three peoples (Bosniaks, Serbs, and Croats) are explicitly and equally taken as the makers, or the authors, of the Dayton Constitution.

valid and plausible interpretation must respect: first, it incorporates false beliefs; second, it does not consider the relevant documents and comments from either the period of adoption of the GFAP, or after the period; third, it passes in silence over some important parts of the legal sources it cites as being supportive of its views. But, there is another really big, probably the crucial, issue: let us imagine that we endorse the U 5/98-III decision; in light of the decision, some essential parts of the BiH Dayton Constitution will become unclear to us. What does this mean? It means that, under the U 5/98-III decision, some inner semantic connections between some provisions of the constitution will become enigmatic despite the first impression that those provisions are interconnected, and that those interconnections are strongly, and rationally, motivated. To use an example from the first part of the essay: ‘John is chasing a dog with a stick’: when we interpret the meaning of the proposition, the interpretation must be such that the connections between the proposition, on the one hand, and some previous propositions that refer to John, a dog, and a stick, on the other, become clearly presented as a part of the interpretation, not left unaddressed, unexplained or enigmatic. In the U 5/98-III decision, the BiH Constitutional Court dismissed this simple rule of both general and legal interpretation.

In a part of the U 5/98-III decision (beginning with Paragraph 65), the Constitutional Court deals with the Dayton Constitution provisions concerning the election of officials to the BiH Presidency and the House of Peoples of the BiH Parliament. It follows from the Court’s reasoning in those paragraphs that they agree with the BiH election law currently in force. In other words, the U 5/98-III decision considers the election of Željko Komšić to the office of the Croat member of the BiH Presidency by a Bosniak-Muslim majority vote as unproblematic.¹⁹ Hence, the decision is unable to recognize, let alone rectify, the discrimination against Croats through the illegal and unconstitutional election of ‘Croat’ to the BiH Presidency by a

19 For more on this issue, see Chapter 4.

Bosniak (or Serb) majority. In Paragraph 65, the U 5/98-III decision claims as follows:

It must not be forgotten that the Serb Member of the Presidency, for instance, is not only elected by voters of the Serb ethnic origin, but by all citizens of the Republika Srpska with or without a specific ethnic affiliation. He thus represents neither the Republika Srpska as an Entity nor the Serb people only, but all the citizens of the Republika Srpska electoral unit. The same also holds for the Bosniak and Croat Members to be elected from the Federation.

Why does the Court pose the Paragraph 65 claim? The answer is again simple. They pose the claim because their intention is to disconnect the fact of the peoples' constitutionality from the fact, or institution, of two entities. Since the Court intends to transform the entities created by specific, not all, constituent peoples into multi-ethnic units to which all the BiH peoples are equally constituent, it also intends to disconnect the process of election of a Croat and a Bosniak (as the BiH Federation constituent peoples' representatives) from the BiH Federation into the BiH Presidency, on the one hand, from the BiH Federation as an entity or a separate federal unit, on the other; and it also intends to disconnect the process of election of a Serb (as the RS constituent people's representative) from RS into the BiH Presidency, on the one hand, from RS as an entity or a separate federal unit, on the other.

However, it is clear that the BiH Constitutional Court must pay a high price for such, and similar, claims; the highest price is in the fact that the interpretation it proposes fails to confirm some otherwise clear semantic connections within the text of the Dayton Constitution. Even if one accepts that RS and the BiH Federation are, as the Court states, solely 'technical' units for the purpose of the election process, which is absurd, it nonetheless remains unclear why Republika Srpska elects one Serb as a BiH Presidency member, and

why the BiH Federation elects one Bosniak and one Croat as BiH Presidency members. More importantly, the character of the connection between the BiH Presidency election provision, on the one hand, and the part of the preamble on the constituent peoples, on the other, remains unclear in light of the BiH Constitutional Court reasoning. It is clear that, in both cases, we deal with identical categories. What explains such an identity? In light of the U 5/98-III decision, such an identity is left mysterious or unexplained, and this also makes the rational motivation of those who adopted the GFAP impossible to understand. In light of the U 5/98-III decision, they are treated like blind persons who have randomly used an identical category in two different provisions of the BiH Constitution (the constitutional provision on the method of the BiH Presidency election and the preambular provision on the constituent peoples).

Moreover, the Croat representatives to the Dayton negotiations look like some morally dubious fools who have, apart from having blindly accepted identical collective categories in different constitutional provisions, eagerly endorsed the kind of ethnic discrimination enacted by their Bosniak-Muslim Federation partners, in both 2006 and 2010, through the latter's election of Željko Komšić as a Croat member of BiH Presidency, but in fact a Bosniak-Muslim representative. Now, as Cicero emphasized, if one can give a legal interpretation which is both more useful and more fair/honest, then one should prefer such an interpretation to one that creates unfair relations and leads to discrimination as, in fact, the Constitutional Court's U 5/98-III decision does, undermining thus directly both multiethnicity and pluralism of BiH. Hence, the U 5/98-III decision is both unpersuasive and unfounded in light of some convincing moral categories as well as in light of a reasonable assumption that underlies all legal interpretation: a) one needs to interpret a pattern of language as reasonable and rationally motivated; hence, b) one needs to present an otherwise clear and motivated use of identical categories in different parts of the text as, again, rationally motivated, i.e., nonenigmatic and nonarbitrary.

3.2 Constitutionality: The GFAP/Constitution as a compromise and the ‘remedy for a reason’

U 5/98-III suffers from another flaw of a fundamental kind. First, one cannot discern from the decision the meaning of the notion of a ‘constituent people.’ Second, as a part of the decision, the notion is reframed in a way that enables us to interpret it at our current convenience, and treat it arbitrarily as it suits our needs. This means that the decision undermines another fundamental principle of interpretation—that interpretation should not yield a result which is less clear than the target text of our interpreting. In fact, the Constitutional Court judges, which here involve ‘the Bosniak-Muslim and international section of the Court,’ approached the process of constitutional interpretation as if it is an interpretation of poetry that can generate new meanings in order to expand the thus interpreted ‘poetry’ in new directions. I emphasized in the first part of the essay that legal interpretation cannot be pursued in such a fashion.

In Umberto Eco’s terminology, by having issued U 5/98-III, the BiH Constitutional Court sided with the doctrine of interpretation which lays a primary emphasis on the notion of ‘*intentio lectoris* [reader’s intention]’ as a key factor and a guiding premise of every interpretation.²⁰ The key inconvenience with such an approach amounts to the fact that it can guide the process of interpreting in an arbitrary direction, according to the interpreter’s whim. Applied to the process of constitutional interpretation, this means that such an approach can be easily made to serve the interpreter’s narrow political interests or agenda; the interpreted text is treated as a ‘*tabula rasa*’ on which the interpreter can write, or draw, whatever s/he likes. Now, why do I pose such a seemingly bold claim on the work of the BiH Constitutional Court?

20 Eco explains the difference between ‘*intentio auctoris*,’ ‘*intentio lectoris*,’ and ‘*intentio operis*’ (the author’s intention, the reader’s intention and the work’s intention) in Eco (1992).

A clear intention of U 5/98-III is to separate the notion of peoples' constitutionality from the notion and legal existence of entities as the BiH federal units. However, objectively, the notion of constitutionality cannot be separated from the institutional structure through which it is materialized. This then forces the BiH Constitutional Court to apply two interpretive-conceptual strategies as follows: one is to dilute fully the notion of constitutionality, that is, to make it fluid, fuzzy, and unclear; the other is to guide the future relations within BiH toward the condition in which both entities and constituent peoples will disappear by making, after the refugees return, such relations fully dependent on numerical relations between majorities and minorities. However, why did the Court decide to sever the link between the notion of peoples' constitutionality and the existing institutional structure? It is important for us to recognize here an aspect which is crucially important: the notion of peoples' constitutionality is the only factor that preserves the two-entity, or federal, institutional structure of BiH; once the structure is disconnected from the notion of the peoples' constitutionality, no further obstacle to a full modification of the structure, including the elimination of the entities, remains in place.

Hence, let us return once again to Paragraph 59 of the Court's decision, which clearly states that 'the recognition of the constituent peoples and its underlying constitutional principle of collective equality pose an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity.' Importantly, the paragraph begins with the statement of the fact that the peoples' constitutionality means that no people is considered as a majority. When you add up the two propositions, you get content that makes no sense. On the one hand, the Court claims that the peoples' constitutionality implies that a difference between a majority and minority cannot be drawn; on the other, it further claims that the peoples' constitutionality implies equality, and that, hence, it implies an obligation on the constituent people(s) in an entity not

to discriminate against a 'constituent minority' within the same entity. In other words, U 5/98-III views the peoples as both constituent peoples and as majorities/minorities, depending on need.

We should also notice that, if we decide to reason as the BiH Constitutional Court does in this case, we will have to stipulate that the change in numerical relations automatically entails a change in the status of constituent peoples—for instance, a more massive return of Bosniak-Muslim refugees to RS should imply that they gradually cease to be a 'constituent minority,' undergo a transformation into a 'constituent majority,' and thus become a people that is constituent to RS. At that time, I believe that the Court, or their international 'supervisors,' foresaw that RS could and should change its official name.

However, this is not the most important aspect of the Court's interpretive reasoning. The most important aspect is in the Court's creation of confusion as to the concept of 'constituent peoples' in order to create a solid basis for a more radical and far-reaching transformation of political-constitutional landscape of BiH in the future. In other words, the Court is not interested in the very notion of the 'peoples' constitutionality.' This can be discerned from Paragraph 52 of U 5/98-III, which states as follows: 'However vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e., as peoples.' It is very clear what one does read in this paragraph—the Court in fact ignores the notion of the peoples' constitutionality, and in its reasoning the 'constituent peoples' suddenly become simply 'peoples.'

The claim that the primary intention of the Court is to disconnect the notion of constitutionality from the institutional structure, not to make all the peoples equal, can be clarified primarily through its treatment of the 'election system' as it is defined by the Dayton Constitution. My previous considerations of this issue clearly imply that the Court suppresses the fact that the act of election (of offi-

cials to some institutions) means primarily the act of representation of the constituent peoples, and that the relevant Dayton provisions on the BiH election methods make sense, and can be treated as rationally motivated, only under such an assumption. This is the only interpretation that can enlighten the connection between, on the one hand, ‘Bosniaks, Serbs, and Croats’ as constituent peoples, and, on the other, the constitutional provision on the composition of the BiH Presidency and the relevant provisions on the composition of the BiH, or the BiH Federation, House of Peoples.

In contrast, in the BiH Constitutional Court’s view, ‘the Serb member of the BiH Presidency’ represents all the RS citizens regardless of their affiliation with a constituent people. In the reasoning of the Court, ‘constituent peoples’ are not represented in the institution of the BiH Presidency at all; hence, the concept of the peoples’ constitutionality is severed from the BiH institutional structure. This is why I can safely conclude here that the U 5/98-III decision does not interpret the Dayton Constitution; it remakes, or revises, it in an arbitrary fashion. This is so primarily because every rational and defensible interpretation of the GFAP, including the Dayton Constitution, must correlate the notion of the peoples’ constitutionality with the institutional structures as those are foreseen by the letter of the constitution.

Here I will emphasize two more things: U 5/98-III focuses on the notion of the peoples’ constitutionality only in one more sense: as a people in the sense of an owner of a stretch of territory. We can recognize this clearly in the fact that the Constitutional Court considers the territorial division between entities as a territorial separation of peoples, hence, as something inherently negative. However, first, ‘the people as an owner of a territory’ is not a part of the notion of ‘people’s constitutionality.’ Second, nothing necessitates the talk about the territorial segregation of ‘constituent peoples.’ Both entities are federal units of a single state; hence they are both the constituent parts of a state. The Dayton agreement foresees some necessary merging of the parts as well as of their constituent

peoples, vis-à-vis some state competences, which means that the entities must not only cooperate, but also act in combination as a single institutional structure without territorial division. Therefore, the reference to ‘territorial segregation between the constituent peoples’ *simpliciter* is, in light of the Dayton Constitution, both misleading and wrong.

The second thing worthy of emphasizing may be put as follows: the fact that U 5/98-III aims at some deeper and far-reaching changes of the constitutional structure may be easily demonstrated by the propositions the Court put forward on the so-called ‘veto powers’ in BiH. Interestingly, and somewhat shockingly to those familiar with the widely accepted forms of political organizing and power sharing, the Court expressed its concern about the veto powers in the areas considered as ‘a vital national interest’:

What raises serious concerns, however, is the combination of exclusionary mechanisms in the system of representation and decision-making through veto-powers on behalf of ethnically defined ‘majorities’ which are, nonetheless, in fact minorities and are thus able to force their will on the parliament as such. Such a combined system of ethnic representation and veto-power for one ethnic group—which is defined as a constituent people, but constitutes a parliamentary minority—not only infringes upon the collective equality of constituent peoples, but also the individual’s right to vote and to stand as a candidate for all other citizens to such an extent that the very essence and effectiveness of ‘the free expression of the opinion of the people in the choice of legislature’ is substantially impaired. (U 5/98-III, para. 124)

One should probably find it bizarre that a constitutional court is able to interpret the ‘veto power’ in such a way. Such a power is constitutionally guaranteed in many states; and, surely and inherently, it does not mean ‘an exclusionary mechanism’ or ‘the forc-

ing of one's own will on somebody.' On the contrary—the power actually prevents one from being a victim of imposition and thus has an exclusively protective character in normal conditions. 'Veto' amounts to a negative feedback: 'this submission/law/motion cannot be accepted (without a modification)'; and as such it is found in, for instance, the powers of US president vis-à-vis the lower house of the US Congress. Hence, 'veto powers' are not exotic or rare at all, and one should even depict them as beneficial due to their capacity to improve a sense of responsibility and foresight in a potential legislator. Also, in Paragraph 124 it is important to take note of the swiftness with which the Court moves from qualifying some representatives as 'constituent people's representatives' to the 'representatives of a (parliamentary) minority.'

Now, what is the peoples' true constitutionality in the context of the GFAP as a compromise, and why can such a notion of constitutionality not be, in the mode of U 5/98-III, divorced from the view of the Dayton Constitution as a compromise?²¹ The notion of constitutionality can be reduced to the view of a people as an author of a constitution. The people determine for themselves some basic laws that will guide their political and legal existence, in conditions that the people accepted through their legitimate representatives. This means that the people determine the structure of institutions through which they will be represented as a people, or through which the people will protect their interests by the passage of laws and the running of affairs of public interest to the people. In other words, the notion of constitutionality is straightforward and simple.

The fact that there are three constituent peoples in BiH can be reduced to the fact that the three peoples equally took part in the negotiating, and endorsement, of a constitution that defines some institutions to serve equally the interests of the three. The constitution also assumed the form of a compromise by which an armed

21 See also Pehar (2002) and Steiner (2006, esp. 158–159).

conflict was brought to a close.²² Immediately prior to, and in the course of, the armed conflict, the parties were unable to reach an agreement on a desirable kind of constitution—the peoples' representatives advocated some irreconcilable political-legal ideas, interests, and goals. Then, starting in August 1995, the consensus was being gradually formed, a process which reached its peak with the Dayton negotiations and the official signing of the GFAP at Paris. According to the constitution, the internal structure of BiH from the years 1991–1992 was conveniently modified (Article I.1 of the Dayton Constitution). BiH continued to exist in international-legal sense, but its internal structure became one of a federated kind of state. Why have the peoples chosen such an outcome?

They have chosen it primarily due to the need of the three constituent peoples to accept and recognize the new structure as legitimate. The Serbs have decided not to secede with the provision that they gain their own entity the institutions of which will serve as the sites of the Bosnian Serb representation as a separate people. Croats and Bosniaks ensured for themselves a similar status in the other entity. They decided to be, on shared and equal terms, represented as constituent peoples in that entity. Finally, all three peoples decided to transfer a part of their powers to the central level of government, to the institutions of the BiH state. The transfer followed one clear formula: two strong entities, one loose central government (Holbrooke 1999b, 96–97).

Furthermore, the constituent peoples decided to open their entities to the neighboring states in the sense of the official/institutional establishment of special parallel relations, in accordance with the division between the entity and state powers as foreseen by the Dayton Constitution. Summarily viewed, no constituent people are harmed in their fundamental collective rights. They are all represented at both entity and the state level, and they all have a set of

22 According to Western and Serwer (2000, 3), 'The Dayton Accords were a territorial and political compromise that ended the war in Bosnia;' however, compare this with Note 14, Chapter 1.

entity institutions in which their interests can be primarily safeguarded and promoted. In other words, the authentic Dayton blueprint does not discriminate against any constituent people. Additionally, it is clear that all three peoples are also constituent at the level of the entire state, through the bodies of central government that has the jurisdiction over the entire territory of BiH. In other words, even prior to U 5/98-III, and without it, the constituent peoples are constituent throughout BiH territory, but, under the Dayton Constitution, 'BiH' simply means a set of common institutions endowed with some common and state-making powers.

This structure is then one of a compromise, but it has some flaws as well. It is clear that the 'Serb people' of the BiH Federation, despite their low numbers, remain an ill-defined category in a constitutional-legal sense. And the same applies to the Bosniak and Croat peoples in RS. This means that I openly concede that, following the adoption of the Dayton structure, discrimination in some degree remains a feature of the Dayton system, but it seems to me also that this is more a kind of discrimination within the constituent peoples, not one between them. Besides, one should also remember the key features of the notion of compromise: some sacrifice or loss is accepted in one area for the sake of a gain in another. Hence, the post-Dayton kind of discrimination should be primarily viewed as a price tag that came attached to the Dayton compromise. Is the price of compromise too high? Having in mind both the tragic losses that the absence of compromise entailed and the inherent value of compromise itself,²³ I don't think it is. Second, and perhaps more importantly, it is only after we recognize the 'remains' of discrimination as well as the necessity to 'pay' a compromise with a loss in some domain that we can start formulating a plausible and viable response to the fact of discrimination. Now, the discriminatory component must not be taken as an excuse to sacrifice the entire com-

23 I will add a few more clarifying remarks on the concept of compromise in the conclusion to this book.

promise, but, it is also clear that some response to the component must be formulated.

Hence, after the adoption of the Dayton compromise, we needed a kind of a conservative change, one that preserves, not removes, the given constitutional structure. Such a change should have taken place only through the legitimate institutional mechanisms—that is, through the amendments elaborated and confirmed by both houses of the BiH parliamentary assembly that mean a new, post-Dayton consensus formed on the basis of equality and without a foreign meddling. However, such a change has not taken place due to moves such as the ‘appointment of the Bonn-powered High Representative,’ ‘Petritsch’s amendments,’ the ‘Barry election rules,’ and certainly the U 5/98-III decision of 1 July 2000, which was passed by a tiny majority of five, against four, judges of the BiH Constitutional Court.²⁴

Let us resume the analysis of the character of legal interpretation that is at the basis of U 5/98-III. When I presented the notion of the peoples’ constitutionality in light of the Dayton Constitution as a compromise, I adhered strictly to ‘Heydon’s Case’ as cited in the first part of this essay. This means that I assumed the premise that the federalization of BiH, through the Dayton Constitution, was performed for a good reason—that it was the remedy to a real mischief of the society that beset it prior to the discovery of the cure. In other words, we need to assume that the constitutional transformation of BiH in 1995 served as a real solution of a real issue that, prior to the transformation, degraded society and even acted as a fuel to the engine of the Bosnian armed conflict. In other words, when interpreting the Dayton constitutional structure, I was guided by the principle that some common reasons need to be found due to which

24 The five included three foreign/international judges who sided with the two Bosniak-Muslim judges against the remaining four BiH judges who include two Croats from the BiH Federation and two Serb representatives of RS. This means that, in this case, a domestic judicial minority outvoted a domestic judicial majority with the help of a foreign element. However, such a characterization of the Court majority in this case needs to be qualified in an important detail, for which see section 3 of this chapter.

the structure was conceived as a solution to a grave political and legal issue that burdened BiH as a political community through a period of its history. The principle is the only one in light of which one can elucidate the concept of the peoples' constitutionality and the true purpose of the Dayton-mediated transformation of the prewar institutional structure of BiH.

However, U 5/98-III refuses to subscribe to such a principle. The decision is not interested at all in the nature of the reason of the remedy that was brought to BiH in the form of the federalization of the state based on the notion of the 'constituent peoples' that consume their rights through specific, constitutionally defined institutions. Actually, U 5/98-III does not look into the past at all. Even worse, the decision looks into a distant future that the Court thinks, without a shred of evidence, the parties to the Dayton compromise projected. The decision is thus one based on fictive collective intentions that will be materialized in a distant future, but such intentions have never been expressed jointly nor projected in a constitutionally recognizable, discursive form. In other words, the decision is premised on a fictive-teleological 'theory' of interpretation.²⁵

Why do I claim this? Let me repeat the key part of Paragraph 73 of U 5/98-III: 'It therefore follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and, thereby, to reestablish the multiethnic society

25 This is also confirmed in the words by James O'Brien (2010, 343), one of the key authors of the Bosnian Dayton Agreement Annex 4 (Constitution): '[T]he parties [Bosnian Serb, Croat and Bosniak-Muslim representatives] almost certainly would not have accepted such a result [the U 5/98-III decision] had they foreseen it. The Bosnian Serbs in particular expected the Dayton Constitution to protect the status of RS as a Serb enclave, not to be a basis for insisting on the equality within it of the three "constituent peoples" of the state.' We need to note here that, certainly, as a collective intention, the parties have not foreseen, or willed, the outcome as charted by U 5/98-III; hence, as a matter of the history of expression of collective intention or volition, U 5/98-III deviates fully from the plausible historical account, as I claim in this chapter. On the other hand, contrary to O'Brien's 2010 comment, Alija Izetbegović, as a Bosniak party representative, must have foreseen the result because U 5/98-III is a result of, and by and large a positive and confirmatory response to, Izetbegović's 1998 appeal to the Constitutional Court. In other words, O'Brien's comment cleverly equivocates on the nature of collective intentions underlying the adoption of the basic skeleton of the Dayton Constitution for Bosnia.

that had existed prior to the war without any territorial separation that would bear ethnic inclination.’ In other words, the U 5/98-III decision implies that, prior to the war, there were no problems at all, and that the Dayton Constitution did not bring any remedy because no remedy was needed. The current federalization of BiH is just a transient moment, something that will disappear in the future, and for it, measured by the fictive criterion of the goals placed in a distant future, there was no need in the first place, according to the Court’s reasoning.

Hence, the BiH Constitutional Court tells us directly that the Dayton Constitution, the key provision of which (I.1) reads explicitly that the internal constitutional structure of BiH was modified through the constitution, is not based on rational reasons, and that the agreement’s key purpose is to self-destruct. The Court views the Dayton Constitution not as a remedy for real ills of a political community, but as something that should return us to the age of a non-problematic, even ideal, prewar past, a BiH as a ‘multiethnic society’; thereby the constitution now in force should effectively cease to apply.

In other words, U 5/98-III was drafted in the spirit of the belief that, in 1992, some barbarians, from the East and West, disturbed the idyllic atmosphere of an undivided, multiethnic paradise of BiH society. It therefore implies that the Dayton Constitution makes sense only as a tool that should revive and recover that period of BiH history. This means that the Court thereby demonstrated a full ignorance of the historical facts of the prewar period in BiH, and also a full lack of understanding of the rational core of the Dayton compromise as ‘a remedy for a reason.’ Obviously, this also means that the Court fully identified itself with the political postwar project of Alija Izetbegović:²⁶ a renewal of the prewar, undivided BiH, one without entities or constituent peoples or collective rights; a nonconsociational BiH organized along the ‘one voter/one vote’ prin-

26 As to Izetbegović’s postwar project, see Chapter 1 for more detail.

ciple. Perhaps needless to say, it is due to such politically arbitrary, legally unfounded, constitutional manipulations that the current condition of BiH is much worse than at the period of the start of the Dayton peace implementation.²⁷

3.3 One procedural inconvenience and the myth of U 5/98-III as a ‘landmark decision on the peoples’ constitutionality’

While discussing U 5/98-III, we need to keep in mind another important procedural fact. The decision was presented to the BiH peoples as generally binding, and it was especially framed as a decision establishing that all constituent peoples were constituent throughout BiH territory. This means that, according to the thus framed decision, BiH entities are naturally multiethnic or should be taken so. However, this is a misrepresentation of the facts pertaining to the history of the decision-making procedure at the Court. Formally, the decision was and remains binding in the operational part which was supported by the court majority. Hence, formally, the entity constitutions should have been amended following the decision, and they were indeed amended.

However, what about the doctrine that was incorporated into the justificatory part of U 5/98-III? What about the part of the ruling that addresses the guidelines that the entity legislatures should follow to amend the constitutional provisions that the Court declared unconstitutional? Contrary to the established view, the BiH Constitutional Court never passed a majority decision on this issue. The Court majority—of five judges including three ‘international’ and two Bosniak-Muslim—did not support the 42 pages that make an attempt to justify the decision and that, more importantly, try to divorce the peoples’ constitutionality from the BiH entity insti-

27 A well-informed reader will notice that, in a nutshell, my view of U 5/98-III is highly similar to the view McCrudden and O’Leary (2013) proposed of the European Court of Human Rights ruling in the *Sejdic and Finci* case.

tutions. Actually, a minority of four judges, including two Bosniaks and two ‘internationals’ (Joseph Marko²⁸ and Louis Favoreu), supported the 42 pages of constitutional ‘fairy-tale’ making. The fifth judge, the Swede Hans Danelius, presented his views separately in a concurring opinion; that is, ‘concurring’ only to the operational part of U 5/98-III.

Looking more closely into his opinion, it is clear that he did not want to deal with the issue of the peoples’ constitutionality. He considered the preamble, in a normative sense, as too weak to support the justification endorsed by the two international judges together with the Bosniak ones. That is why, in his opinion, Danelius draws only on two simple facts: first, the RS Constitution, insofar as it defines RS as a ‘state of the Serb people,’ is not in harmony with the Dayton Constitution, which explicitly defines RS as an entity. Second, he claims that the entity constitutions are not in harmony with the Dayton one because the exclusive reference to Serbs in the RS Constitution, and to Bosniaks and Croats in the BiH Federation Constitution, as constituent peoples to the respective entities, according to him, violates Article II.4 of the Dayton Constitution, the so-called ‘provision on nondiscrimination’: ‘The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ However, one should im-

28 Vitomir Popović, a Serb judge, in his dissenting opinion (BiH Constitutional Court 2000, 82) claims that Marko should have been exempted from this case. As Popović states, Marko was a member of the Venice Commission group who, upon a 1996 request of the then High Representative, Bildt, gave a positive view on the issue of harmonization of the entity constitutions with the Dayton Constitution; four years later, in U 5/98-III, Marko endorsed a view contradicting his previous one. In Popović’s opinion, ‘there is no doubt that this questions his [Marko’s] objectivity in the work on this case and in any case; according to the Rules of Procedure and positive legislation, it represents a valid reason for his exemption from this case. Here, I do not want to mention the manner of voting on the request for exemption but I must say that the judges whose exemption was requested also were deciding on that exemption, which could be seen from the Minutes of the Court’s session when the decision on this request was adopted.’

mediately notice that Danelius, in contrast to Marko or Favoreu, does not outline a constitutional revision through which such discrimination, of, e.g., Bosniaks and Croats in RS, could be removed.

Hence, the most essential conclusion that follows from the way in which U 5/98-III was procedurally adopted is as follows: the thesis that the international factor in BiH, through the BiH Constitutional Court, determined that the BiH entities must be multiethnic, is a vacuous myth which gathers its force from frequent repetition, i.e., from myth propagation. The majority who supported the decision have indeed supported only its operational part, the injunction to the entities that they need to remove certain provisions from their constitutions. Since the very justification is supported by a minority, in reality it cannot be, and should not have been, taken as binding at all.

Second, this explains why High Representative Petritsch issued in 2002 the so-called 'Airport decision,' which enforced a large number of amendments on the entity constitutions, and by which, among many other things, the composition of the Federation government was changed to the disadvantage of Croats (one of the two peoples that constituted the BiH Federation in the first place) as follows: eight ministerial seats filled with Bosniaks, five with Croats, three with Serbs, plus a majority rule of the decision-making. Of course, U 5/98-III in its explanatory part cannot fully justify 'Petritsch's amendments,' but the latter are in line with the decision. One could also claim that it is only through the amendments, and dictatorial powers of a High Representative, that the explanatory part of the Court decision became a part of the constitutional landscape of BiH. Altogether, this simply means that neither of the post-Dayton 'revolutionary' interventions into the BiH constitutional landscape survives a closer scrutiny in terms of a reasonable interpretation, or a legitimate revision, of the Dayton Constitution.

3.4 Analogies

Abuse of courts, including constitutional ones, by some politically powerful figures who receive favorable and preferential treatment by judges, is not an exceptional or rare practice. Especially at the higher levels of judicial decision-making, where judges are appointed by commissions, governments, or presidents and not elected directly by the people. This, however, makes the higher judicial branches especially susceptible to the political forms of influence and swayable under political power relations. This is why it can happen that a judge delivers his or her verdict not in accordance with the rule and letter of law, but with the demands of the most powerful ones and/or those on whom the judge's salary, reputation, or future career most directly depend.

It is a phenomenon that is already described, accounted for, and named as 'political judiciary' (or *politische Justiz*, in the German). Many democratically minded theorists or practitioners of law and politics have warned about the dangers of the phenomenon and have tried to prevent it. For instance, Thomas Jefferson warned about the dangers of 'judicial despotism' in the work of the American Supreme Court, which conduct deliberations behind the closed doors, and occasionally promote and protect a factional, not a public, interest (Jefferson n.d.). Reminding us directly of Jefferson, but drawing in explicit terms mostly on the ideas of President Abraham Lincoln, Robert A. Burt emphasized that, when it comes to the key notions and issues of the US Constitution, no branch of power must delegate to the others the power, or the right, of constitutional interpretation (Burt 1992).

There are many examples of a high-level court issuing a ruling which is clearly unfair, politically motivated, and contributory to further destabilization of the community to which it is addressed. Let us give just a few examples from the work of the US Supreme Court: *Dred Scott v. Sandford*,²⁹ *Korematsu v. US*, *Plessy v. Ferguson*,

29 Due to its connection with the phenomenon and issue of slavery, this ruling is one of the most

Abrams v. US. All of these rulings were unjust, and yet all of them were taken, at least for a period of time, as binding. Of course, many individuals pointed early, or promptly, to the rulings' unfairness and even illegality. Also, it is important to emphasize here another feature of such politically motivated judicial verdicts: many of them were later overruled by different means, for instance, by an amendment passed by the Congress, or by a later, revisionary ruling by the same court. History of the German judiciary offers the famous example of a 1924 ruling by a Munich court in the case of a notorious individual named Adolf Hitler. Hitler was an Austrian who, according to the letter of the law, should have been expelled from Germany because of the coup d'état he attempted in 1923, and the law prescribed 'expulsion' or 'deportation' as a penalty to foreign nationals for such a misdeed. However, the court decided not to apply the law to Hitler. As the court pointed out, 'To a man whose thinking and feeling is German to such an extent as is the case with Hitler ... according to this court's understanding ... the provision of the Law on protection of the [Weimar] republic [through expulsion] cannot be applied' (quoted in Stammen 1995, 100).

U 5/98-III in its argumentative and explanatory part should be viewed as analogous to the aforementioned rulings. It is a court decision which supplies an interpretation of the Dayton Constitution guided by political ideology and political interests. It is a decision passed exclusively due to the interests of some politically powerful figures, from the US primarily, who decided to lend political support to a minority faction within BiH. In the process, the wording of the Dayton Constitution was exploited and manipulated in those parts that were exploitable for the given purpose. As demonstrated above, it is clear that the decision can be easily shown to be unpersuasive through some simple arguments that give consideration to the totality of the Dayton Constitution as well as to the context and rea-

famous US Supreme Court decisions. For further bibliographic references, the tenor of the ruling and a theory of the ruling's causal power to contribute to the outbreak of the American Civil War, see Pehar (2016e).

sonable purposes of its adoption. Additionally, there is no doubt that, sooner or later, the decision will be formally exposed as unfair and biased, and also as harmful to the BiH political community.

The question of how this will be done is less important than the question of what should have taken place instead of this decision. However, the latter question can be easily answered in clear and justified terms. No constitutional court, especially not one in which a majority can be easily formed by three international and two Bosniak-Muslim (or two Croat, or two Serb) judges, can substitute for, or make a better and more enduring impact than, the internal procedures as foreseen by the Dayton Constitution, primarily the procedure of carrying out negotiations between entities and the passage of constitutional amendments by a two-thirds parliamentary majority. As long as powerful international actors have a different opinion and as long as they continue exerting a critical influence on BiH relations, especially through the figure of the High Representative, BiH will remain in a state of a predemocratic, war-torn, and excessively divided society that vegetates politically within a frame of a fictive statehood at both the entity and the central level.³⁰

30 Should the reader need an assessment of U 5/98-III, which is favorable to the decision and irreconcilable with the assessment offered here, I would recommend Bieber (2006, 121–133); see also Woelk (2011) who, on p. 22, incorrectly claims that U 5/98-III was ‘welcomed by the Bosniak and Croat parties as well as by the International Community.’ The Croat parties did not welcome the ruling, and additionally, we need to keep in mind that, nearly two years after the ruling, the High Representative, Ambassador Petritsch, had to impose the constitutional amendments on the Bosnian entities, which, in light of Woelk’s claim, should be very puzzling.

The Issue of the Bosnia and Herzegovina Election Law: The Curious Case of Željko Komšić, Our ‘Vidkun Quisling’

The two previous chapters give us a general sense of what went wrong with the process of the Dayton peace implementation. Those in charge of the process of legal interpretation decided to go to an arbitrary direction, to impose such a direction on all the parties, and have thereby unsettled the original Dayton compromise. Chapter 2 explains one negative aspect of such a process: the ‘ultimate interpreters’ decided not to take into account one document that should have determined the process of interpretation as to at least the BiH Federation relations—the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina (DAIF)—despite the fact that UN Security Council in formal terms continuously expresses its commitment to the treaty. This means that the ‘ultimate’ or in-charge interpreters of the Dayton peace framework acted as if they were free to ignore one key block of the textual, and constitutional, evidence that could not be reconciled with the key aim of their constitutional thinking. Second, Chapter 3 looks at the positive aspect of such a process: it explains the sense in which the positive direction proposed in July 2000 by the BiH Constitutional Court, which here simply means ‘a quasi-majority of three international plus two Bosniak-Muslim judges,’ cannot survive a close scrutiny in general and constitutional-interpretive terms. It seems as if the authorized interpreters of the Dayton agreement aimed not at finding a stable, reasonable, and justified end point of constitutional interpretation of the treaty, but at a point that would produce a further

discord and, due to its injustice, motivate the Serb and the Croat parties to the treaty to remain forever alien and inimical to the peace implementation process.

In this chapter my analysis is focused on a more specific issue that can serve as a very vivid illustration of such injustice. It is the issue of the election method in general and of the election of BiH Presidency members in particular. Again, my key asserting is that the empowered, or 'ultimate,' interpreters of the Dayton peace treaty supply an interpretation that is not only unjust to at least one of the BiH constituent peoples, but also prevents BiH from figuring as a true multiethnic, or pluralist, democracy that can equally house the three constituent peoples of BiH as enumerated in the preamble to the Dayton Annex 4, i.e., the BiH Constitution. Prior to presenting my critique, in the introduction to this chapter I will clarify the nature and role of the election process in a democracy, and then propose a number of preparatory theses concerning the notion of a democratic representative in Section 4.1.

Introduction

According to its basic intention and rationale, the democratic method/frame of decision-making should primarily serve the purpose of a peaceful and discursive conflict resolving. When some individuals and groups came across the idea that their association ought to be guided by two rules, one which stipulates that the people should rule itself, and another which stipulates that such a rule needs to be founded on a publicly declared and accepted code of laws binding on all, such an idea was primarily put into service of the channeling and institutionalization of social conflict. The purpose of the idea was to enable both individuals and groups to refrain from a nondiscursive or violent means of conflict resolution, and to engage in conflict resolution by talking, coming to agreement, and generally by those methods of decision-making that embody fair, widely

comprehensible and stable procedures that apply equally to all the members of the community.¹ Such procedures are supposed to facilitate a joint, discursive, nonviolent, and stabilizing arrival at principally just end points (conclusions, decisions, adjudications, policies) to which all the community members need to be committed.²

A clear example of the peacemaking, discourse-based function of democracy can be found in the institution of election of legitimate group representatives. Elections are held and organized in accordance with rules that apply to all. One of the most frequently discussed of these rules is the ‘rule of majority,’ which in some cases is enriched and qualified to such an extent that it can be, for all practical purposes, reduced to the rule of consensus.³ Additionally, elections should take place in a context in which certain fundamental liberties are protected: the candidates must be given an equal opportunity to present a program, while members of the electorate must have unimpeded access to all (essential) information that could influence their free and reasoned choice. The election outcomes ought to be determined by a simple vote count as a part of a fair and transparent procedure that permits no distortion or deforming or hiding of results. Finally, it goes nearly without saying that everyone, including those who voted for the candidate who was not elected, need to endorse the outcome of the voting as legitimate; everyone should deem the process to be one of stabilization of the intragroup relations.⁴ Hence, the elections should produce a stabiliz-

1 The very first clear example is found in *Eumenides*, the third part of the *Oresteia* trilogy, by Aeschylus: the Council of Areopagus votes to declare Orestes not guilty of a murder of his mother, Clytemnestra, and thereby establishes itself as a supreme judicial council of Athens. For a general introduction into classical Greek democracy, see Woodruff (2005).

2 A pertinent theoretical frame is proposed in Galtung (1965); Galtung’s ideas are further elaborated in Luhmann (1992); see also Lefort (2003, 20).

3 Čedomir Čupić points out that ‘democratic political culture is unthinkable without another device—consensus. The best solutions in social life are achieved by a consensus of all participants, because, when there is a consensus in political decision-making, there is no outvoting and there is no sense of negligence, of unfairness or a defeat’ (in Harrison 2004, 318); see also Von Gierke (1996).

4 This entails the need to propose a solution to so-called ‘Wollheim’s paradox of democracy,’ on which see Harrison (2004, 283–293).

ing and legitimizing sequence of outcomes: candidacy, electoral campaign, the voting itself, the declaration of result and the resolution of complaints, the implementation of the outcome, and the establishment of the relevant authorities. In all this one can unmistakably recognize the nature of the democratic frame of decision-making as one which steers communal conflicts (between ideas and interests) in the direction of a form that is amenable to rational and discursive control and which prevents such conflicts from degenerating into violence, armed actions, or even war.

It needs to be emphasized immediately that such considerations do not imply the following claims: first, they do not imply that democracy can be effectively reduced to the notion of procedures. Second, they do not imply that elections are the only means of implementation of a democratic frame, or that democracy can be defined simply as a series of free elections.⁵ Third, and most importantly, they do not imply the idea that a democratic frame will always succeed to translate an unruly and uncivilized form of conflict into a form that allows for a discursive and peaceful conflict resolution. Such a frame may be projected, but then remain ineffective or non-materialized. There is the possibility that, at one level, we have defined the democratic frame and procedures, which involves a possibility in principle of the implementation of democracy, but then, at another level, the very same procedures get abused, or interpreted, in a way that effectively blocks implementation of the very procedures. In this case the procedures are abused or misinterpreted and thereby guided toward unjust and destabilizing outcomes. In such a case, one is faced with the 'suicide of democracy.'

This is why I consider the problem of interpretation to be a critical one. Those communities that suffer from a serious disagreement over the question of how one need to interpret the procedures (or institutions, or rules) cannot function effectively as democracies. This additionally implies that procedures alone do

5 See, for example, Pettit (2001).

not suffice—we also need a consensus in the matter of interpretation that cannot be produced by a purely procedural method.⁶ Note also that an interpretation, despite its intrinsic nonpersuasiveness and weak logic, may be imposed due to the power relations that prevail at a given moment in a given political context. Such an interpretive imposition will unavoidably produce an increase in social-political instability and effectively transform a potentially democratic frame into nondemocratic one. Today's Bosnia-Herzegovina provides a crystal clear example of such a transformation, of a 'bastardization' of what may originally be a sound and democratic procedural frame.

Such considerations also explain why some recent ideas about 'agonistic democracy,' as proposed by Chantal Mouffe, are unpersuasive and *de facto* cannot be implemented. Mouffe claims that democracy is formed fundamentally by two things: a replacement of the notion of 'political enemy' with the notion of a legitimate political adversary; and, second, a common symbolic/institutional frame that is shared by political adversaries and that places limits on the conflict between them (Mouffe 2005). Due to the problem of interpretation of a procedural frame, such an idea is unpersuasive and nonimplementable. Given the assumption of a true politically adversarial relationship, which entails a disagreement over the ways of interpreting of a common institutional frame, such a frame cannot be unambiguously legitimate or efficient. True democracy rests on a true consensus concerning the issue of interpreting and implementing of procedures, which is then, *contra* Mouffe, bound to take democratic mechanisms of decision-making in the direction of political friendship, or, to put it in a more neutral vocabulary, of a peaceful and discursive resolution of political conflict.

6 I advocate the view that discourse-ethics is the only thing that can really help us in this regard; the tradition of discourse-ethics dates back to the age of the Greek orator and theorist of rhetoric Isocrates, and includes a number of influential contemporary theorists such as Donald Davidson, Jürgen Habermas, Matthias Kettner, Bernard Williams, and Philip Pettit; for more detail, see Pehar (2011c; 2016c).

Before I present the case of the ‘bastardization’ of democracy in Bosnia-Herzegovina, I need to remind the reader of some important facts concerning the notion of a ‘democratic representative’ or ‘democratic representation.’

4.1 Democratic representation and representatives

A democratic representative is not simply an individual. It is an individual, or a group of individuals (for instance, a parliament), endowed with one additional aspect that turns him, or her, into a legitimate representative. Simply speaking, one larger group of people needs to stand ‘behind’ the individual and consider him or her as one who is of a pivotal importance to the group taken collectively. This additional aspect, which is what makes one truly a representative, can be grasped only in terms of the theory of discourse generally, and in narratological terms more specifically. Thomas Hobbes, the author of *Leviathan* (1651), is the first political theorist who presented this additional aspect in clear and convincing terms (Hobbes 1994, 101–105).

A sovereign representative, the key figure of *Leviathan*, is, metaphorically speaking, ‘a seat of power’ in the sense that the representative, apart from being an individual, also figures as a common voice of those who elected him collectively. In other words, sovereign representation is a social relationship involving a group and an individual, the core of which is that the group deems the individual sufficiently authorized to speak in the group’s name. Hobbes presented such a relationship in the following terms: one who assumes the position of a sovereign representative thereby becomes ‘*persona*’ in the literal Latin sense of the word (which is a translation of the classical Greek term *prosopon*, meaning ‘a theatrical mask’). He puts a ‘mask’ on his face and thus gains the status of one who is more than an individual; one to whom the group attributes a special role in accordance with the mask which can be grasped properly as a symbol and demonstration of a special script/screenplay. The sovereign represen-

tative is tasked with the performance of both the role and the script (Skinner 2002; 2007). In other words, a sovereign representative is an artificial person brought to life by a projection of social will into a single individual who is, through such a projection, endowed with the status of a 'moral person' to a collection of individuals taken collectively. This further means that, by putting on the mask, a key condition of the transformation of community into a single political-theatrical space, the sovereign representative undertakes the commitment to the idea and ideal of 'a common or public good.' The whole community endows the representative with a sufficient amount of initial trust, an *a priori* moral capital, to be able to undertake, and start implementing, such a commitment.

In other words, the sovereign representative needs primarily to stage a drafted script, which involves deliberating and adjudicating on the premise of common good with the purpose of protecting the collective body. This can be illuminated only through a discursive theory of sovereign representation. A 'representative' is one who employs and implements the political-legal-moral language in such a way that the language forms and safeguards a collective political body in an especially emphatic mode. His discourse is taken as representative of a collective body in a political sense, and, once elected, he himself is deemed capable of confirming and protecting such a collective body primarily by his argument, that is, by laws and law enforcement.

This complex discursive process is feasible only on the basis of some foundational discursive virtues: truthfulness, integrity-coherence, reasonable understanding, interpreting, and implementation of the law, i.e., of collective promises with the status of law, and finally the willingness to buttress one's own decisions with a reasonable and generally plausible argument. For instance, it is impossible for a group to take a liar, or a promise breaker, as the group representative. Such figure lacks the necessary elementary moral capital. In contrast to such a figure, the community endows its own representative with an *a priori* moral capital because it views him as sufficiently credible and as interested in the ideal of public good.

It is important to emphasize immediately that the discourse-based theory does not imply the view that trust could not be abused. Hobbes claims that a sovereign representative puts on the 'mask of a moral person' that represents, and embodies, political power of the group taken collectively. However, it is obvious that the way in which the sovereign actually performs his role, as a part of his mandate, may deviate from the promise, or from the ideal of the common good. Some sovereigns perform the role more successfully than others. Apart from such deviations, a proper sovereign representative can be recognized without much difficulty. As Aristotle pointed out in the *Nicomachean Ethics*, s/he is concerned exclusively with the attributes of 'honor/morality' and 'dignity' (*timé kai géras*) that will be awarded to him, or her, following his or her successful performance of the role with which s/he was entrusted through the 'mask of the sovereign' (Aristotle 1996, Book V, 1134b1–8).

This has two main implications: the role of 'sovereign representative' is processual; it evolves over time and proves itself gradually. The 'mask' involves some standards/values that can be achieved and confirmed only through a longer period. In other words, one is not a sovereign; one becomes a sovereign through the successful acting of the role of the 'servant to the common good.' Second, the right of the group to control and supervise the way in which a sovereign representative embodies the 'persona' of common good never ceases to apply. The group's voice is one that endows an individual, or a group, with the mask of collective body/good, which means that the mask is removed when such a voice is redirected, or when the group realized that the voice was attracted by fraud or manipulation.

Now, what is the most important fact concerning the sovereign representative? It is his inherently peacemaking or peace-promoting function. In addition to his concern with the rule of law, which is indeed a key factor of peace and stability, the sovereign representative also embodies a free and noncoerced voice of the people. He is the figure with which the popular will agrees, and about which a fundamental consensus, brought about by a peaceful discursive

procedure, reigns. In other words, he is living proof of the ability and readiness of the people to agree on a single issue—Who ought to represent the popular will in the sense of a collective good? The function of peacemaking and peace promoting can be easily explained through some counterexamples.

The key problem with representatives such as Sejdo Bajramović, Željko Komšić, or all the quislings of World War Two, is in the fact that they were imposed. Those who impose such representatives thereby offend collectively a group of people, and thus generate, first, the sense of humiliation in the group and, second, the need to oppose or resist the violation of a fundamental value—a free and reasoned human choice. Additionally, as we deal with individuals who really belong to the group that is a subject to humiliation, a nonsovereign representative, i.e., a quisling, also generates symbolic disintegration and uncertainty within the group. He demonstrates that ‘some of us’ do not hesitate to accept the condition in which submission, and humiliation, is disguised as democracy whenever such a condition brings personal benefits to them. As to Sejdo Bajramović, one can plausibly argue that his appointment was one of the causes of the deterioration in relations between the Kosovo-Albanian community and the Socialist Federal Republic of Yugoslavia, i.e., Serbia. Quisling making is a practice that marked World War Two; hence, it is not difficult to draw the conclusion that the election of Željko Komšić contributed to the worsening of the relations between some communities.

Before presenting more detail concerning the ‘Komšić’ problem, I need to emphasize the following: the aforementioned function and meaning of the ‘sovereign representative’ has been recognized and emphasized many times in history; in addition to Hobbes, we also find it in Aristotle, in the American founding fathers’ theories (Harrison 2004, 111–113), and in contemporary political theory, for instance in Philip Pettit (Pettit 1999). In a rudimentary form we also find it in Searle’s discourse-based theory of institutional facts. For instance, in his influential book, Searle put it as follows:

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. Because the status is constituted by its collective acceptance, and because the function, in order to be performed, requires the status, it is essential to the functioning that there be continued acceptance of the status. The moment, for example, that all or most of the members of a society refuse to acknowledge property rights, as in a revolution or other upheaval, property rights cease to exist in that society.... One of the great illusions of the era is that 'Power grows out of the barrel of a gun.' In fact power grows out of organizations, i.e., systematic arrangement of status-functions. And in such organizations the unfortunate person with a gun is likely to be among the least powerful and the most exposed to danger. The real power resides with the person who sits at a desk and makes noises through his or her mouth and marks on paper. (Searle 1996, 117–118)

In other words, the status of a sovereign representative holds as long as a relevant community recognizes and supports his or her status. In such a sense, how should we explicate the status of Željko Komšić as a member of the BiH Presidency, and through what mechanisms has his own status been discursively produced?

4.2 The 'Komšić' problem and the constitutional logic of ethnic electoral units

Željko Komšić, a Croat from Sarajevo, and a former leading member of the Social Democratic Party of BiH (SDP), was elected twice as a member of the BiH Presidency, in 2006 and 2010. (However, see note 17 in this chapter.) He was elected to the position as a Croat, and the election was in accordance with the election law currently in

force, according to which the candidate needs to declare officially his or her ethnic identity as a part of his candidacy, in this case as a Croat, following which he, together with a Bosniak candidate for the BiH Presidency, is elected from the territory of the BiH Federation by a simple majority vote. What is the key problem with the election of Željko Komšić as a BiH Presidency member from within the Croat population?

According to the election law currently in force (BiH Election Law 2001), the election of Komšić is legal and legitimate. However, is it constitutional? Is it in accordance with the Dayton Constitution for BiH, i.e., Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina? One does not need an extremely rich capacity for legal-political argumentation to be able to demonstrate that the election of Komšić was unconstitutional in a very clear sense. The opening of the door to the election of Komšić, as a Croat candidate for the BiH Presidency, by a Bosniak majority vote was an effect of an unreasonable interpretation of the relevant provision of the Dayton Constitution. Hence, the election law itself is a consequence of an unreasonable interpretation of the Dayton Constitution, and thus unconstitutional in this respect, too. Namely, Komšić was obviously elected predominantly by a Bosniak vote in the BiH Federation as a Croat member of the BiH Presidency.⁷ What is wrong and unconstitutional with such a practice?

First, let us check what the Dayton Constitution stipulates about the BiH Presidency. Article V of the constitution reads that the Presidency will be composed of three members, Croat, Serb, and Bosniak, elected by the following method: Croat and Bosniak by a direct vote from the territory of the BiH Federation, and a Serb by a direct vote from the territory of Republika Srpska (Constitution of Bosnia and Herzegovina 1995). It needs to be emphasized here that the provision describes the Presidency at its successful formation.

7 For an accessible and empirically sound presentation of the 'Komšić' issue, see Kasapović (2016, esp. 177–185) and Vukoja (2013).

It does not give any detail about how to arrive at the composition. It sets the condition that the vote should come from different entities, depending on the ethnic marking of a seat, but it does not explicitly address the issue of possible limitations on the candidates who start the electoral run. It is focused on the end result of the process. However, the election law now in force has turned this provision into something different—the law has read it as a provision that places some limits on the identity of the very candidate running for the post. As the election law put it (Article 8.1), ‘Bosniak and Croat candidate winning a majority vote among the candidates from within the same constituent people will be elected.’⁸ Now, is this provision necessary? And, does it follow from Article V of the Dayton Constitution? Second, and more importantly, does this provision provide the only possible interpretation of Article V? Even more importantly, if it does not, is it possible to demonstrate the superiority of such an interpretation over alternative ones?

I will here, in a few simple steps, explain why such an interpretation is actually less reasonable than the interpretation I propose here, hence, why the election law now in force is unconstitutional. It follows immediately from the premise that the election of Željko Komšić, by a Bosniak majority vote, to the position of a Croat BiH Presidency member was an unconstitutional act.

First of all, it is important to point out that, according to the election law, the issue of the ethnic identity, i.e., of the connection between the constituent people membership of an election candidate, on the one hand, and the constituent peoples themselves, on the other, is essentially removed from the agenda. It is raised only once—at the moment of the declaration of ethnic membership by the candidates themselves. Once a candidate declared him- or herself as a candidate (Croat) or a candidate (Bosniak), the additional issues concerning the constituent peoples are not raised. It is a bi-

8 The term ‘Bosniak and Croat candidate’ should prompt one to thinking—as a candidate individually announces his or her candidacy, such terms do not make sense; the candidates concerned are in fact those who have declared to be ‘a member of the Bosniak or the Croat people.’

zarre consequence primarily because the Article V reference to Bosniak, Serb, and Croat members of the BiH Presidency was not an accident. It was a strongly motivated provision that reads as it does due to some critically important principles.

An accurate and reasonable interpretation of all constitutions, including the Dayton one, is marked by two facts: first, it explains the motivation of a larger number of important constitutional provisions than is the case with the alternative and competing interpretations; second, such an interpretation can be shown to be more just/ethical and more useful than the alternative, or competing, interpretations.⁹ For a start, one should notice that, if we decide to reduce the issue of ethnic identity to the issue of the ethnic membership declaration by individual candidates, as stipulated by the election law, we shall effectively divorce Article V of the Dayton Constitution from the essential part of the preamble to the constitution, which reads that, ‘Croats, Bosniaks, and Serbs, together with Others, are constituent peoples of Bosnia-Herzegovina.’

In other words, the individual candidacy of Željko Komšić, who declared himself to be a Croat candidate, was in no way intrinsically tied to the constituent peoples, Bosniaks, Serbs, and Croats, of Bosnia-Herzegovina. Candidacy as such, including the limitations on it in the sense of the necessity of the ethnic membership declaration by an individual candidate, is inherently unrelated to the fact of coconstitutionality of the peoples of BiH. Hence, in this part the election law does not relate at all to the preamble of the Dayton Constitution. This is strange because every international lawyer who has some experience with matters of interpretation will confirm that a document’s preamble carries a special weight for the purpose of interpretation simply due to the fact that it is exactly in the preamble that one normally finds a definition of foundational princi-

9 These are two traditional canons of interpretation: the first one stipulates that interpretation should explain the meaning of semantic elements within their context, while the second is emphasized especially in Cicero’s classical study *De Inventione*; for more detail, see Pehar (2006b, esp. 134–137).

ples and purposes of the treaty. Preambles are a distinctive and highly important part of the context within which we interpret the terms of an agreement or a constitution.

In fact, once we couple the BiH Presidency provision with the preamble to the Dayton Constitution, we will necessarily arrive at the following explanation/interpretation: the provision on the BiH Presidency composition is an effect of a foundational principle laid in the preamble to the constitution. Its aim is to protect the equality of the constituent peoples of Bosnia-Herzegovina. Were the things meant otherwise, one could feel free to replace Article V with the provision that stipulates as follows: 'The BiH Presidency will be composed of a Chinese, a Russian, and an Englishman.' However, in reality, a Bosniak, Croat, and Serb are referred to simply because Bosniaks, Serbs, and Croats are indeed equally the constituent peoples of BiH. Their coconstitutionality and equality in such a sense are reflected in the composition of the BiH Presidency. This furthermore implies that the BiH Presidency provision needs to be interpreted as a limitation on the sources of legitimacy, or on the ways of democratic representation.

Who is, under Article V, represented in the BiH Presidency, or what is the Presidency representation of? It is a representation of the three constituent peoples through the three Presidency members. Hence, the Article V terms, 'a Croat,' 'a Bosniak,' and 'a Serb,' in fact mean the following: 'a Croat representative,' 'a Bosniak representative,' and 'a Serb representative.' In other words, the BiH Presidency is legitimate only if it adequately reflects the equality of the constituent peoples of BiH, which immediately implies the requirement that the separate constituent peoples are separately represented in the BiH Presidency. This is the only way to ensure constitutional validity of the election of the BiH Presidency members. The issue of candidacy is absolutely of no importance. The status of a constituent people cannot be safeguarded by posing the question to an election candidate concerning his or her ethnic affiliation. Such a status can be safeguarded only by posing to the

constituent people the question of who they wish to see as their own representative.¹⁰

Željko Komšić was thus elected by an election law that includes a flawed interpretation of the Dayton constitutional provision on the BiH Presidency composition. He was elected by a Bosniak majority vote as a ‘Croat representative,’ which is an absurd consequence of an absurd and unfounded interpretation of the Dayton Constitution. The alternative interpretation proposed here is clearly superior to one proposed by the election law because it takes into account a larger number of relevant provisions, and correlates those provisions that are *prima facie*, by a sound logic and semantics, inherently mutually connected. Hence, the interpretation of Article V proposed here explains the true reason for the stipulation in the article; it attributes a rational meaning to the article in a plausible fashion. The interpretation, which today serves as a practical background to the actual organization of BiH elections, does not have such consequences, and, in light of such interpretation, one cannot recognize the rational motivation, the rational meaning, that motivated the original authors of the Dayton Constitution.

I have also emphasized that a plausible and pertinent interpretation is marked by another feature: in contrast to the alternatives, it is both more just/ethical and more useful. The constellation, in which Croats elect their own representative while Bosniaks elect one of their own choosing, is both more just and more useful than the con-

10 It is of a critical importance to note that, at Dayton, the issue of the BiH Presidency composition loomed large. As Holbrooke states, in his Dayton Peace Prize acceptance speech, Izetbegović even proposed a nine-member collective BiH Presidency. In the speech Holbrooke also, importantly, added that ‘the country should not have three ethnically based Presidents.... We knew that ... they should only have one President.... When we say “ethnic” ... it’s just a fancy name for “racism”’ (Holbrooke 2005a). In other words, Holbrooke here implies that he, and the US decision-makers, disapproved of the three-member presidency provision and took it as an imperfection of the Dayton agreement, which also implies that, under the US leadership in the process of implementation, the provision will be treated as ‘backward-looking’ in the sense of Jim O’Brien’s classification mentioned in Chapter 1. Second, Holbrooke’s description of the provision as implying ‘an ethnic base’ also entails the thesis on the Presidency provision as one that should be interpreted in the sense I propose in this chapter—as a provision on the ‘BiH Presidency as constituent peoples’ representation.’

stellation in which Bosniaks elect both a Croat and a Bosniak representative. The people recognized as coconstituent ought to enjoy the equal right of democratic representation. Hence, the proposal I put forward is more just than the alternative in the sense that the right of equal representation is upheld and safeguarded; and it is more useful in the sense that the alternative, the sad reality of today's Bosnia-Herzegovina, is likely to cause a further destabilization and deterioration of relations, or a loss of trust in democratic institutions, and similar, while my proposal does not entail such effects.

Now, what is the ultimate outcome of the constitutional logic proposed here? Obviously, it is the logic of 'ethnic electoral units.' Croats from within the Federation ought to elect their own representative to the BiH Presidency, and Bosniaks ought to elect one of their own. This means that all the Croats authorized to vote should participate in the process of the election of their own BiH Presidency member-representative.¹¹ Hence, the ethnic identity of the voter, as a member of a constituent people, is the only factor that should be taken into account. Such identity is one that determines the size of the Croat electoral unit in the BiH Federation. One must not relate to such units in the way that, for instance, Herzeg-Bosnia was formed, or the Federation cantons. The Croat electoral unit is fully determined by the ethnic identity of the voter. The same applies to the Bosniak electoral unit. In other words, electoral units are not territorial compounds, but they expectedly have to be territorially marked simply because the peoples live on territories. Most importantly, keep in mind that such units are formed *ad hoc*, for a specific purpose, and mean a single thing: to confirm the constitutionality of the peoples in the form of the liberty to elect openly their own legitimate representatives.

In an analysis I have already criticized (Pehar 2014c), Bieber and Galičić evince an open animosity toward the idea of ethnic electoral units, and, more importantly, show readiness to disfigure and transform it illogically into the question of territorial demarcation.

11 The same logic can be applied easily to the House of Peoples of the BiH Parliament.

The latter, however, is simply irreconcilable with the basic rationale of the idea. No external observer, or constitutional theorist, is authorized to draw the map of the ethnic electoral units. The only relevant authority in this regard is the peoples themselves and the latest census. It is very clear that Bieber and Galičić covertly introduce into the idea of ethnic electoral unit something that does not belong there: for instance, they claim as follows: ‘Provided that two electoral units were established in the Federation, one with a Croat and another with a Bosniak majority, it should be expected that the elected candidates represent a corresponding majority national group’ (Bieber and Galičić 2014, 66).

Here we see an error right at the start—it does not make sense to speak of an electoral unit with a ‘Croat majority.’ This means that somebody from the outside should determine the boundaries of the unit, which makes no sense. In other words, Bieber and Galičić give a kind of shape or twist to the idea of ethnic electoral units that makes the idea immediately nonimplementable. That is why, for the two authors, a ‘Croat’ from Sarajevo becomes problematic straight-away (*ibid.*). They allocate him or her—in their mental map—into an electoral unit with the Bosniak majority, which is an erroneous and undemocratic step. The Croat from Sarajevo is the only one who can determine which electoral unit s/he is affiliated with; of course, s/he may decide not to vote, but that is a different issue.

Constitutional logic of ethnic electoral units has another major impact. It does not involve the limitation on ethnic affiliation that should be placed on the candidates. In other words, following the Croat or Bosniak vote, the candidates elected will figure as a Croat and a Bosniak representative in the BiH Presidency regardless of their own ethnic affiliation as individuals. Hence, the relevant provisions of the BiH Constitution do not prevent a member of any ethnic group from running for the post of a constituent people’s representative in the Presidency; the electoral unit is one that decides on the matter. This means that, according to a reasonable interpretation of the relevant constitutional provisions, Sejdić, for instance,

as a member of the Roma minority, has the right to run for the post of the Croat, and Bosniak, representative to the BiH Presidency. However, keep in mind that the election law currently in force is actually the only obstacle—it forbids Sejdić to run for such posts because it requires that Sejdić declare, prior to the running, his ‘Bosniak’ or ‘Croat’ ethnic identity, which, however, he cannot do nor should he.

This has another major consequence. The BiH Constitution does not discriminate in the sense in which the European Court of Human Rights, in its *Sejdić and Finci* verdict (ECHR 2009), claimed the constitution discriminates. Discrimination that is currently in place is an effect of the election law now in force. Now, as I argued, *verbatim* Article V of the constitution does not address the issue of the ethnic identity of a candidate, and the best semantic construction of the article implies that the peoples themselves are those who should determine which candidate they wish to see as their own representative. There is no solid reason why Sejdić could not believe that he would be a good Bosniak representative in the body, and there is no solid reason why Bosniaks could not believe that Sejdić indeed should be elected as their own representative.¹²

Altogether, this implies that the international community has organized a major constitutional fraud in BiH. Namely, they have been repeating, like a mantra, their point that the *Sejdić and Finci* verdict involves a demand that the BiH Constitution be revised or amended. The verdict in fact involves a demand that the election law be declared unconstitutional, but keep in mind that the law was imposed by the international representatives, Ambassador Barry, the Organization for Security and Co-operation in Europe, and the OHR¹³; in other words, the foreign representatives have been gen-

12 This means that I endorse a stronger critique of the ECHR *Sejdić and Finci* verdict than one proposed in McCrudden and O’Leary (2013); I think the court in this verdict argued from some factually false premises.

13 In fact, the international representatives (Organization for Security and Co-operation in Europe, led by US ambassador Barry) directly supervised the process of drafting of the election law; hence, ‘imposition’ or ‘coercion’ may be insufficiently strong terms in this context (see Gilbert 2008, 139; Kasapović 2016).

erating problems and troubles in BiH, while repeatedly claiming that something is wrong with the country and its peoples. In my opinion, such a strategy serves to justify a continued role of the international community as a 'protector' of BiH, and probably a future owner of its financial and economic assets.

4.3 Positive effects of the idea of ethnic electoral units

Apart from being a direct consequence of a reasonable and persuasive interpretation of the relevant constitutional provisions, the idea of the ethnic electoral units has some further implications that speak in favor of its implementation and promotion. As I argue, it is the implementation of the idea that would enable the true democratization and pluralism of political life among Bosniaks as well as Croats in BiH. The idea is likely to ensure a sufficient amount of initial fairness, clarity, and safety in the political landscape of the Federation, without which a true democratization or pluralism cannot take place.

Imagine that we have a Croat electoral unit. Imagine further that a number of candidates from different political parties are registered to run for the posts in the BiH Presidency. First, it is clear that all the parties will be a part of a process that leads toward a fair outcome. One constituent people elects their own representative, the other their own, and no imposition of electoral will take place. This makes sure that all the parties and candidates view themselves as an equally valid part of a truly legitimate and democratic process. Second, as to the issue of clarity, it is very clear to the candidates that they need to address a specific section of the population to gain the section's trust. They address the group that will ultimately vote for, or against, them. There will be no fudging, which is then bound to have a positive impact on the clarity of political ideas and projects proposed by the candidate. Additionally, the individual candidates and parties will sense a natural need to make

their profile distinct in relation to the competing candidates and parties. The differences that are now of lesser importance are likely to become more important. Again, this is bound to have a positive effect on the political relations within BiH and the Federation.

Third, the ethnic electoral units are likely to produce a sufficient feeling of safety among the Croats, while for the Bosniaks such units may help to replace a false sense of security and power with a sense of responsibility for those who will tomorrow represent the group. Namely, the sense of safety is one of the key elements of democracy—it removes fear and an erroneous belief that the very existence of one's people is at stake. It is likely to produce a more relaxed atmosphere, a sense that 'our own destiny is in our own hands,' which is likely to improve the cognitive quality of decision-making as well. Those who vote in a more relaxed atmosphere, without a threat to their fundamental rights, are likely to form a more balanced, and reasonable, view of the candidates than those voting in an atmosphere of fear.¹⁴ All dictators and tyrants tend to keep their subjects in the state of a paralyzing fear, a condition in which certain relations cannot be questioned or challenged, to ensure that the subjects remain in need of a strong leader who protects the unity, or perhaps even survival, of the group. That much we are familiar with from the history of political ideas and processes.¹⁵

To the aforementioned we need to add another, fourth, factor which indicates that the ethnic electoral units are likely to contribute strongly to the inner pluralism and democratization of BiH politics. For a start, one should pose some simple questions: Who is bound by Željko Komšić's decisions? Can his decisions, being ultimately based on an implausible and unconstitutional legal interpre-

14 In the current conditions, the average Bosnian Croat tends to vote emotionally—they adhere to the 'strongest' (but, also most corrupt) Croat party, HDZ (Hrvatska demokratska zajednica, or Croat Democratic Union), in the belief that this could save them from being outvoted. This, of course, generates a 'vicious circle'—the voting for the 'strongest' Croat party cannot prevent the possibility of being outvoted that is legitimized through the election law currently in force; in the given conditions, the Croat vote actually prolongs the agony and reproduces the unfair/unconstitutional constellation—which can be broken only by the policy of the ethnic electoral units.

15 See, for example, Neumann (1974).

tation, be binding at all, and for how long? Furthermore, can the decisions by the BiH Presidency of which Željko Komšić is a member be binding? I think the obvious answer to all these questions is No. Željko Komšić does not represent the BiH Croats; hence, his decisions cannot bind Croats. With regard to his relationship with Bosniaks, however, Komšić's decisions cannot bind the group either since he faces a competitor in the very Presidency in the figure of a competing representative elected from the list of the candidates who declared their ethnic affiliation as 'Bosniak.' Now, if the figure should not be taken as a competitor, but as an ally, then again we face a problem: in such a condition, the BiH Presidency is definitely not the site of true political pluralism and democracy. In fact, Komšić's role seems to have been exhausted by the announcement of his electoral victory—it boils down to the demonstration of a Bosniak numerical might vis-à-vis the Croats, and also of the readiness of an admittedly large number of Bosniaks to exploit the unconstitutional election law and neutralize the will of the constituent people who, according to the same constitution, are supposed to act as the Bosniaks' key partner.

Now, imagine that, instead of Željko Komšić, a BiH Presidency seat is filled with an elected representative of the Croat people. The representative's decisions, and the decisions by the Presidency as a whole, are likely to become both binding and, as they pass the test of three independent policies, more authoritative. They will reflect sincere pluralism of views as held by the Presidency members. In such a condition we should be able to talk about a consensus within the BiH Presidency, or a real democratic dialogue that reflects the diversity of views, or the BiH Presidency as an embodiment of a multiethnic and pluralist BiH democracy. Hence, when viewed from the perspective of the strength and legitimacy of decision-making, the logic of the ethnic electoral units proves itself to be vastly superior to the current way of electing members to the BiH Presidency. Such logic, and its positive effects, provides additional support to the view of divided, yet democratic, societies that Arend Lijphart presents as follows:

A third point of broad, if not absolute, agreement is that the successful establishment of democratic government in divided societies requires two key elements: power sharing and group autonomy. Power sharing denotes the participation of representatives of all significant communal groups in political decision making, especially at the executive level; group autonomy means that these groups have authority to run their own internal affairs, especially in the areas of education and culture. These two characteristics are the primary attributes of the kind of democratic system that is often referred to as power-sharing democracy or, to use a technical political-science term, 'consociational democracy.' A host of scholars have analyzed the central role of these two features and are sympathetic to their adoption by divided societies. But agreement extends far beyond the consociational school. (Lijphart 2006, 43)

4.4 Democratic representation and the 'bastardization' of BiH democracy

Just as agreements and constitutions can be implemented, they can also be violated. Violation of an agreement, or a constitution, however, can take a specific shape: it can take place, and be quasi-justified, through unreasonable legal interpretation that is imposed due to some special power relations within a community. For instance, in BiH a majority of political actors may decide not to oppose the interpretations by the High Representative simply out of the fear of sanctions, despite the fact that a body that passes constitutionally unjustifiable, and yet final, decisions cannot be reconciled with the principles of constitutional democracy. A community marked by the presence of such a body cannot be deemed democracy simply because such a community does not rule itself.¹⁶

¹⁶ A more detailed explanation and discussion is in Chapter 6.

In BiH we deal exactly with this kind of community. We deal with a community that is nominally a democracy, but in reality is a 'bastardized' form of democracy, a form in which, by putting an unreasonable interpretation on some key democratic procedures, the 'international community' (led by the US and UK) has divorced those procedures from their democratic meaning and purpose. The international community has thus, by the means of interpretation, transformed democratic procedures into nondemocratic ones that lead to unjust and illegitimate outcomes. It has thus contributed to a further destabilization of BiH democracy and deprived it of its key function: to serve as a mechanism of channeling and institutionalizing social-political conflict, or of transforming such conflict into some rationally or discursively controllable, and ultimately peacefully resolvable, forms. The most obvious example of such a development can be found in the 'Komšić problem,' which is a consequence of the international community's decision to interpret Article V of the BiH Constitution in unreasonable and implausible terms, and then to incorporate such an interpretation into the BiH election law. The effects of such interpretation remain with us. Komšić continues to hold the office of BiH Presidency member,¹⁷ and over the last eight years of his mandate the responsible bodies and officials have done almost nothing to prevent the problem from recurring.

As already mentioned, Komšić cannot be deemed a democratic representative. A democratic representative is one who, by being

17 This article was originally published prior to the general 2014 elections in BiH. In the course of the elections, a true Croat representative was elected, but this was due to the factor of sheer luck: the number of highly influential Bosniak candidates for the Bosniak BiH Presidency seat was high, which attracted a large amount of 'usable' Bosniak votes. However, even in such conditions an alternative Croat candidate favored by Bosniaks, Martin Raguž from HDZ 1990 (Hrvatska demokratska zajednica 1990, or Croat Democratic Union 1990), managed to receive a large portion of the Bosniak vote and came in a close second. (At the time of the proof-reading of this book, on 20 November 2018, Željko Komšić was sworn in for the third time as a BiH Presidency Croat member elected by a Bosniak majority vote. The Croat leading parties again strongly protested, and promised this would be the last time the BiH Constitution was violated to the detriment of the Croat constitutional role/position in BiH; also, as a symbolic countermeasure, the Croat-majority cantons and towns in the BiH Federation declared Komšić 'persona non grata'.)

elected, gains a special ‘mask’ enabling him, or her, to figure as a protector of the common or public good. Komšić was elected through a flagrant violation of the BiH Constitution; hence, his very holding of the post is an outcome of the violation of the common good of BiH democracy. In other words, he is unable to act in the sense that Hobbes’s sovereign representative does. Also, he is unable to carry the a priori moral capital that a sovereign representative needs in order to perform his duties suitably. The election of Komšić involves the silencing of a voice of a community whom the Dayton Constitution preamble designates as a ‘constituent people.’ More importantly, even if Bosniaks do not elect a Croat representative at the next electoral round, this will be of no essential consequence to the political relations, or frame, because the election law now in force enables and legitimizes such an outcome, a repeated ‘Komšić.’ Hence, the election law sanctions some anticonstitutional outcomes, and therefore cannot be deemed or described as democratic.¹⁸

I have already emphasized that Komšić in BiH actually figures as a quisling. Quislings were in the course of World War Two imposed by the Nazis who were backed by a massive military force. The force that the international community applied to impose a nondemocratic outcome in BiH, i.e., to impose on a people a ‘representative’ who actually is not theirs, is a force of a different, softer kind; it is a force of interpretation sanctioned by a quasi-authority of the High Representative as a quasi-ultimate interpreter of the BiH Constitution.

Imagine that Hitler imposed on Norwegians the law which stipulated that Vidkun Quisling would act as their representative, ex-

18 One needs to keep in mind that, internationally, a majority of BiH political party leaders signed an agreement on 1 October 2013 ‘on how to come to [a] solution on pressing issues’ at the European Commission (EC 2013). The text of the agreement, dealing with the *Sejdić and Finci* ruling, stipulates in Article 5 that ‘the method of election of the two Presidency members from FBiH through constitutional amendments, should, in addition to the Strasbourg Court ruling, prevent imposing the outcome of election results on any Constituent Peoples or “Others.”’ However, such agreements on fundamentals still waited for a viable translation into the text of a passable election law; also, a part of the international community (e.g., the US, in this case), and the Bosniak-Muslim leadership, including primarily the SDA, acted as if the aforementioned agreement was not signed.

cept in those situations when another people, for instance Germans, decided to permit Norwegians to elect their own representative. This is a condition we face in today's Bosnia-Herzegovina. The 'state' is not a democracy, and as such it is not viable. However, obviously, for some parties of the international factor, such a nonviable 'state' is a welcome fact. In their minds, the election law currently in force does not serve the purpose of enabling free and fair elections, but of keeping the major part of the Bosnian population extremely dissatisfied and, often enough, without a proper electoral representation at an important, and highly visible, level. Interestingly, the US and UK (and many from the EU) representatives to Bosnia present such a democracy-unfriendly policy frequently as an embodiment of a perfect democracy, as a holy grail imported from abroad that no Bosnian, or even foreign, citizen should question or criticize.

Interlude

Recognizing Bosnia's Constituent Ethnic Identities¹

When one enjoys the privilege of conversing with an intellectual member of the opposition as represented by Mujanović (2012), why should one need another war?² Productive participation in intellectual debate of any kind depends on one's readiness to endorse a number of dialogical, epistemological and ethical rules, principles and values that guide our common discursive practice, and that, if endorsed, demonstrate our ability to remain within, and uphold, discourse as a common institution which is a prerequisite to all others. However, I am sorry to say that Mujanović showed no such readiness; actually, nearly all his replies to my contribution to the *Trans-Conflict* debate demonstrate that he does not hesitate at all to violate such rules and principles whenever he wrongly thinks that such a violation should support his case. So, I start with a number of observations concerning Mujanović's ethics of reading, argumentation, and epistemology. Then I will quickly proceed to say a few words about his historical and political claims.

5.1 Ethics of reading, argumentation, and epistemology

Mujanović is imputing: this means that he openly attributes to his interlocutor the claims that the latter has not proposed at all. I am

1 A version of this brief polemic was originally published as Pehar (2012c).

2 See my own 'Bosnia—Fully Ripe for Another War?' (Pehar 2012a), to which Mujanović's article is a reply.

not sure, and ultimately I do not care, about the pattern of motivation that drives Mujanović's 'contributions' to the debate: he may be a too quick, or too inattentive, reader, or he may be trying to misrepresent his interlocutor's propositions in order to make his own ideas more likeable to the reader. For instance, he presents my claims as follows: 'Pehar's rather bombastic (and unsupported) claim that BiH is once again on the brink of war,' and 'Pehar's belief in such a claim likewise informs the thesis of his book on Alija Izetbegović.' He also refers to what he wishfully thinks to be my 'pointed critique of the Dayton system and the international community's continued (un)involvement in BiH.' Now, all Mujanović's attributions are false and, perhaps more importantly, misleading to the reader. It is untrue that I posed the claim that Mujanović attributes to me, and that claim does not inform my book on Alija Izetbegović, either (Pehar 2011a). Also, in my book on Izetbegović I have not substantiated the view that Izetbegović was an Islamic fundamentalist, which Mujanović imputes to me, but that he was an 'Islamic supremacist,' which is not the same thing at all, and which is not the key aspect of my argument, either. The fact that Mujanović imputes such ideas to me should serve as a prior warning to the reader not to take his proposals, or historical and political claims, too seriously. Namely, imputation is definitely one of the most severe violations of the norms of discourse—it puts an advocate of a view, in this case me, in the position of having to respond to a challenge that is founded on misrepresentation of the view, while on his part the challenger, in this case Mr. Mujanović, shows utter disregard to the actual content of the view and therewith attempts to discourage the advocate from responding to the challenge. In this case his attempt is, of course, unsuccessful.

Mujanović shifts his own, and the reader's, attention to the themes and issues that are not directly relevant to the topic of the debate: My contribution to the TransConflict debate was not about Izetbegović in the sense in which I analyzed the political agent in my book; but suddenly Mujanović sensed the need to say something about the

book (which is false), and to introduce into the debate something that belongs more to an historian's work than to the realm of political or constitutional theory. I will say a few words about his historical claims in the next section; the reader should here take note only of the fact that, by having introduced such historical considerations, Mujanović has watered down the discussion and tried to convince the reader by an erroneous *ad hominem* kind of argument (which is a logical fallacy): 'I [Mujanović] am on the side of those innocent victims of the Bosnian War, hence I am decent, progressive.... Hence, my argument is valid.'

Mujanović is not engaged with the interlocutor's argument: My contribution to the debate was primarily about the Dayton Constitution, the conflict of interpretations that ensued, and about the role of 'international community'; it was not about any kind of discursive practice, as Mujanović seems to have concluded, but about a responsible discursive engagement within the confines of a legitimate debate in which all participants attempt to make their own contributions in accordance with the rules of a civilized discourse—for instance, 'when one claims something, one should provide an argument of inductive, deductive, or abductive kind,' or 'when your interlocutor claims something, make sure you understand the key points of the claim,' and similar. Very basic stuff. However, Mujanović has simply passed in silence over the key steps of my argument. This makes me wonder. Is Mujanović able to formulate a political theory-informed opinion about the status of the High Representative in the country for which he, I mean Mujanović, has tried to do so much?

Mujanović does not care at all about persuasiveness, or logical-epistemological soundness, of his own contribution to discourse-debate: In response to my claim that BiH citizens have in many ways legalized and legitimized the Dayton Constitution, he makes a number of heavy-handed and unreflective remarks. The remarks are of such a low epistemological-logical quality that I would strongly suggest to Mujanović to enroll for a very basic introductory course of logic (or first order logic, as it is nowadays called) before he submits his

PhD thesis. He tried to persuade the reader by an analogy of the ‘impromptu public grievances’ after the death of Kim Jong-il. However, the analogy does not hold; it is irrelevant and focused on the wrong kind of problem. Simply speaking, the citizens going to election polls in any country (electing their representatives to the offices as outlined by a constitution), on the one hand, and the citizens expressing publicly a kind of emotion directed at their—loved or hated—leaders, on the other, are two distinct categories. The claims concerning the latter should not be directly, without a further logical-epistemological elaboration, transferred to the former. Mujanović’s analogy is therefore flawed and makes no sense—it suggests either that the BiH electorate elects ‘Kim Jong-ils’ (?) or that it is insincere vis-à-vis specific party representatives/candidates when filling the ballot, which has no bearing at all on my claim concerning the widespread legalization of the Dayton Constitution. Anyway, there is, for Mujanović, a good introductory book by Wesley C. Salmon, with an instructive chapter on analogies (Salmon 1984).

Note also that Mujanović uses an elementary version of statistics (‘the voter turnout barely surpassing the 50% mark’) as inductive evidence in support of his own thesis that BiH citizens are increasingly dissatisfied with their political representation. But then the statistics must also surely mean that more than 50% of the BiH voter population is actually satisfied with the current situation or with their current political representation? This suggestion is flawed; people go to election polls for various reasons—some of them to preserve the status quo and express their satisfaction, some to signal dissatisfaction and try to change something, some of them actually make up their mind only at the polls, etc. In other words, a relatively low, and also a high voter turnout may indicate all kinds of things; to draw from it directly, without additional evidence, the conclusion that Mujanović does is simply a very bad application of logic, a pattern of reasoning that should be used only as an example of sophistry or logical fallacy.

Finally, Mujanović claims as follows: ‘My sense of the reaction to my work so far has been that the only people really complaining are foreign administrators and local apparatchiks who either stand to personally profit from the continued polarization and division of political life in BiH, or of the foaming-at-the-mouth, rabid chauvinist sort.’ Now, as I am definitely not a foreign administrator, this means that I am a local apparatchik. To which I should add that Mujanović’s attribution of ‘evil character’ to his intellectual opponents will ultimately lead to disengagement of them all, which is probably the worst case scenario for any scholar.

5.2 Historical claims

Epistemological and discursive errors similar to those that permeate Mujanović’s discourse on my own discourse are an important part of his historical narrative, his discourse on past discourses and the agency of the others.

As already mentioned, he unashamedly distorts the key argument of my book on Izetbegović. In the book I presented an argument in support of the thesis that Izetbegović was coresponsible, or equally responsible, for the outbreak of the war in BiH. I presented and substantiated the thesis of Izetbegović’s equal responsibility in a very precise sense, which Mujanović has failed to address and of which I kindly ask the readers to inform themselves by reading the book. Now, instead of an historical, documented argument, Mujanović simply claims—and wants his claim to be taken at its face value—that Milošević was the villain who destroyed Yugoslavia; hence he must have been the villain who came close to destroying BiH too. But, again, Mujanović simply does not reach my argument—I do not care about Milošević—I claim that Izetbegović was equally responsible, not that Izetbegović was responsible and Milošević (or Tuđman) was not. Of course, my thesis of ‘equal responsibility’ is irreconcilable with another claim that Mujanović

makes, again without any substantive evidence in support of it: Izetbegović was, according to Mujanović, simply a reactive politician; he was, to put it directly, forced into the war.

This is historical inaccuracy. In late 1990 Izetbegović started threatening the possibility of war (see Pehar 2011a, 141). More importantly, he started publicly expressing the view that the Muslim people of BiH were a guarantor of BiH, and that the other two constituent peoples of BiH (Croats and Serbs) were in possession of so-called ‘reserve countries,’ which for him conveniently implied that BiH Muslims should enjoy a special, comparatively higher status in their ‘only country’ (Pehar 2011a, 147–150). His view represented a flagrant violation of the BiH Constitution then in force because, under the constitution, the three peoples were treated as equal in their status of the constituent peoples to BiH. In other words, Izetbegović openly contradicted the constitutional consensus as early as late 1990, and thereby started sowing the seeds of armed conflict. But, this is just one among many historically well documented examples on which I draw in my book.

Mujanović’s historical inaccuracies serve several purposes; one is to hide the fact that the war in BiH was an effect of the conflict of political ideas and projects. The war was not about bad guys and good guys, or about villains and victims, or about civilization/multiethnicity and barbarism/monoethnicity. The war was about opposed political projects concerning the political-constitutional make-up of a post-Yugoslav BiH and the fact, that the war ended by an agreement that explicitly transformed the internal political structure of BiH in the way it did (and the agreement explicitly states that the structure was modified, which was symbolically reflected in the fact that the name ‘Republic of Bosnia and Herzegovina’ was at Dayton modified into just ‘Bosnia and Herzegovina’), proves my point to a sufficient degree. I am aware that Mujanović will scream here ‘Genocide!’ and that his image of a small but brave David defending himself against two evil neighbor Goliaths may be too deeply carved, but I am writing this for the reader, not for Mujanović.

I will just remind both Mujanović and the reader of Ambassador Holbrooke's memoir about Dayton, in which the latter complained about the negotiating behavior of the Bosniak-Muslim delegation who, as Holbrooke found out to his astonishment, seemed to have come to Dayton without a coherent negotiating position. In other words, Izetbegović's 'guys' seemed not to have had a clear idea about the political goals they intended to achieve through the armed struggle in which they were fully involved and which brought about enormous human sacrifice.³ However, this was, in all likelihood, a deception—the Bosniak-Muslim leader had a clear view of his own goals, but as the goals were set maximally, he spoke of them only on rare occasions. The following are Izetbegović's words at the BiH Presidency session held on 28 January 1994:

We [Bosniak-Muslim representatives-leaders] have been voicing different perspectives. Some objections are directed at me from abroad—tell us, Bosnians, what do you want? Tell us, we need to know. One of us claims one thing, another claims another, the third a third, and the foreign secretary claims a fourth thing. Those gents abroad do not know what we want. Now, watch out, what do we want? Something is missing in this formula—our views do indeed vary. Do you know why? That depends on our possession of weaponry, or our lack of weaponry. If we possess weaponry, the whole of Bosnia is a result. If we totally lack weaponry, then we have to accept something else (original quote from Pehar 2011a, 39/139).

In other words, Izetbegović had no problems with the notion of BiH whose constitution is fully and exclusively dictated by the pref-

3 In fact, they seem to have come to Dayton without being aware of the fact that in September 1995, barely a month before the start of the Dayton peace talks, their own representative, and foreign minister, Muhamed Sacirbey, signed an agreement on 'basic principles' (Basic Principles 1995), which set the outline of the Dayton Constitution, and was negotiated between Bosnia, Croatia, and (former) Yugoslavia (that is, Serbia and Monte Negro), under American mediation. American representatives were, to put it mildly, shocked by the Bosniak-Muslim 'fudging' at Dayton, on which see many references in Holbrooke (1999b).

erences of a single ethnic group, with ethnic cleansing, or subjugation, of both Serbs and Croats as a highly likely side effect of such a policy.

Implicit historical claims are also an important part of Mujanović's proposal of the 'BiH civic constituent assemblies.' The reader must have noticed that Mujanović believes that the BiH government is bad, whereas BiH citizens are good. At least to me it seems that Mujanović suggests that the 'good' BiH citizens have been constantly misled by the 'bad' BiH politicians—hence, we need to address the citizens themselves directly, without involvement of those bad 'nationalist kleptocrats' as Mujanović names them. Now, this is really a tricky issue, because I think that Mujanović's words are simply demagoguery. I would not dare to qualify the citizens of a country in the way he does. In a political sense, I do not think of them highly, and I do not think of them lowly. They elect their own representatives freely, according to their own conscience, preferences, and well- or ill-informed opinion. But these are the facts: in 1990, the nationalist parties won by landslide the first free elections held in BiH; in 1996, following a bloody war, again nationalist parties won by landslide. In 2010 among Bosnian Croats and Serbs, nationalist parties again won; while among the Bosniak-Muslim population, the Social Democratic (but predominantly monoethnic, Bosniak-Muslim) Party (SDP) receives a relatively higher ratio of Bosniak vote.⁴ With marginal exceptions, BiH citizens support 'nationalist' parties, or, to put it more precisely, parties that are oriented toward specific ethnic constituencies.

Now, what is the key point and purpose of Mujanović's historical fabrications that also draw explicitly on Cirkovic (2012), who claims that the Dayton Constitution is 'an example of the elimination of an identity, and the creation of new ones or the recognition of only select identities'? (This is entirely misleading—BiH has been

4 The 2014 general election produced a similar result, but with a significant loss of the Bosniak-Muslim vote to the SDP.

defined primarily as a home to its three constituent peoples, its 'local ethnic identities,' at least since the time of ZAVNOBiH,⁵ i.e., World War Two.)

To put it concisely, their purpose is to try to achieve, or call for, a radical destabilization, and possibly disintegration, of the Dayton structure for BiH. Revolutionaries do not write histories that are morally and epistemologically responsible or well-documented. They use history as a political weapon. To illuminate the politics that misrepresents itself as the 'embrace of the ideal of difference,' I proceed now to the final section.

5.3 Political claims

Mujanović claims that he is not some sort of secret SDA⁶ cadre. For the debate, this is irrelevant. However, what is relevant for the debate is the fact that he has very clearly positioned himself within the landscape of Bosnian political theory and practice. For those of us who follow the developments in the landscape, it is not difficult at all to demonstrate that he belongs to the camp of the Bosniak-Muslim revolutionaries who cultivate a peculiar attitude to the Dayton structure of BiH. Their attitude is defined by the following premises:

1. The Dayton Constitution (DC) is fundamentally flawed—it rests on 'ethnic principles' and embodies a 'contract with the devil,' or the fall into barbarism.
2. The DC ought to be not amended or revised, but dismantled and replaced with a totally different structure as soon as possible.

5 The State Anti-Fascist Council for the National Liberation of Bosnia and Herzegovina (Zemaljsko antifašističko vijeće narodnog oslobođenja Bosne i Hercegovine, or ZAVNOBiH) was formed during World War Two. On 25 November 1943, ZAVNOBiH declared Bosnia and Herzegovina to be an equal community of Serbs, Muslims and Croats.

6 Stranka Demokratske Akcije (Party of Democratic Action, SDA), a leading Bosniak-Muslim-oriented, nationalist/patriotic political party in Bosnia and Herzegovina.

3. Those who are opposed to the idea are simply ignorant or evil—they serve either the butchers like Tuđman, Karadžić, Milošević,... or the foreign conspirators who aim to profit from a continued polarization of the Bosnian politics.

The camp has its prominent members, around twenty public intellectuals with high-rank academic positions, and is located almost exclusively in Sarajevo—politically, it is a mouthpiece of the leaders of Bosnian Muslim-based ‘Unitarianism,’ Alija Izetbegović and Haris Silajdžić; the latter calling, throughout the post-Dayton period of his political career, for the disintegration of the Dayton structures through the process of disempowering of the entities, the Bosnian federal units. Their ideas are to a large extent driven by a particular emotive condition—a feeling that the Bosnian Serbs, and to a lesser extent Croats, have won only a first part of the war (the cognitive part of the feeling is, of course, nonsense), and that now the ‘victory’ should be reversed, or made irrelevant, by the repetitive expressing of the erroneous claim that the present constitutional make-up of BiH is so flawed that a normal human being could not endure it.

The camp’s core includes the following political and legal theorists and historians: Omer Ibrahimagić, Esad Zgodić, Asim Mujkić, Nerzuk Ćurak, Šaćir Filandra, Edin Šarčević (who has been propagating ‘Mujanović’s’ ideas over the last three years in Sarajevo, with generous support from the Konrad Adenauer Stiftung⁷ but with no tangible effect), and Tarik Haverić. I cannot discuss the specific views of them all here, but I can confidently assert that the foundations of their views, or arguments they present, are so frail that their political motivation is actually the only interesting part of the story. For instance, Asim Mujkić (to whom Elena Cirkovic refers as an academic authority) claims that the identities of ‘Bosnian Serbs’

7 In February 2014, the Konrad Adenauer Stiftung (Sarajevo Office), together with the European Academy—Sarajevo, published a brief study concerning the (recent) constitutional position of the BiH Croats; in Pehar (2014c) I explain in some detail why I view the findings of the research as negligible and, in many parts, simply erroneous and misleading.

and ‘Bosnian Croats’ are a product of the ‘essentialist illusion’ (‘essentialism’ is a metaphysical view committed to the principle that the items, things, processes in both social and natural world have some essential marks or features), but then he happily proceeds to treat the ‘Bosnian-Herzegovinian’ identity as something that is not a part of the ‘essentialist illusion.’ Interestingly, he does not argue more than that—a preposterous metaphysics and a preposterous argument.⁸ The camp members not only have a problem with the Bosnian ethnic identities, but with the ‘Herzegovinian’ part of the Bosnian identity, too.⁹ This, in their view, introduces a kind of undesired multiplicity, or pluralism, within the Bosnian identity—Ibrahimagić, for instance, claims that the attribute ‘Herzegovinian’ is a historical error committed by the Austro-Hungarian and/or Ottoman Empire in the second half of the nineteenth century.¹⁰

Contrary to the camp’s school of thought, over the last twenty years I have been advocating the following series of claims:

1. The DC, and the Dayton framework for peace, is a compromise (see especially my argument and explanation in Chapter 3 of this book).

8 I propose a detailed analysis and critique of Mujkić and Šarčević in Pehar (2011b). One of Šarčević’s legal sophisms that I refute in my essay reads as follows: ‘Contrary to the Dayton Constitution, there must be an inherent Bosnian nation, above all constituent peoples to Bosnia, due to the fact that the 1974 Constitution of the Socialist Federal Republic of Yugoslavia refers to “republics and their own peoples.”’

9 Political premises and connotations of different uses of, and perspectives on, the name of the state are most extensively discussed in Ančić (2005).

10 Similarly to Ibrahimagić and Mujkić, Zarije Seizović (2014), another member of the camp, offers a proto-Marxist interpretation of the Bosnian collective identities, in which ethnic identities are presented as a means of deception by the ‘evil’ leaders who foster fear and panic about a (simulated) ‘external enemy’ in the minds of the citizens, thus creating a kind of fog in which the leader can organize all kinds of criminal, and profit-making, activities. Interestingly, and illogically, Seizović also claims that the ‘Bosnian-Herzegovinian’ collective identity, as a supra-ethnic identity, is exempt from such ‘proto-Marxist’ manipulation. Typically of the ‘Sarajevo camp’ of Bosniak revolutionaries, he also calls for the removal of the constitutional category of ‘constituent peoples’ and proposes that the most pertinent solution of the issue of the BiH Presidency would be to have a single-member, i.e., noncollective, Presidency. I evaluate critically Seizović’s ideas in Pehar (2015). Seizović here simply repeats Filandra (2004), who claims that the Dayton agreement, due to its ethnicity-, or constituent peoples-related provisions, is fundamentally irreconcilable with the existence of the state of Bosnia-Herzegovina.

2. DC contains the ethnic-identity-related and also, often strongly worded, civic-integrative elements; those who claim otherwise have not read, or understood, the document.
3. The ethnic-identity-related elements are there for a sound reason: they should prevent ethnicity-based discrimination; the only way to do so is through the constitutional reference to the actual ethnic categories as deemed relevant by the BiH peoples. (Chapter 4 of this book explains how one such element was violated by the international community, which allowed the Bosniak-Muslim element to commit open discrimination against the Croat element in a specific, yet highly important, area.)
4. There is nothing in ethnic identities as such that makes them an enemy of civilization, or of democracy or a constitution. One can be both a Croat and a cosmopolitan, or a Croat and a fascist. As Amartya Sen in his *Identity and Violence: The Illusion of Destiny* plausibly emphasized, human beings are made of clusters of collective identities, and the causes of the political problems that are from time to time generated by such identities cannot be reduced to a single identity as the only culprit. In other words, there is no fundamental incompatibility between a 'self-identifying Bosnian Serb from *Republika Srpska* who can defend his vital national interests,' on the one hand, and a 'good BiH citizen who can identify and actively promote the cause of a common good for all BiH peoples and citizens' on the other.
5. Hence, political culture is the only factor that is capable of upholding the DC structure. This also directly implies that, despite the fact that the Dayton-based institutions matter hugely, the problems of Bosnian politics ultimately require more than an institution-focused view. A solution to such problems is to be found, or rather searched, in a progressive development of an enlightened, conflict-transformative civic culture that recognizes the Bosnian constituent ethnic

identities along the DC lines, treats them in a nondiscriminatory fashion, and solves the problems, through reasoned communication and argumentation, on a case-by-case basis (hence, as follows from Chapter 1, a discourse-ethics based on the republican political philosophy is probably the most likely remedy to the political ills of BiH).

6. A part of the international community and a part of Bosnian political-intellectual elite, especially among the Bosniak-Muslim population, are opposed to the previous five points, which is likely to have an adverse effect on the process of the Dayton peace implementation in the long term (and, highly likely, on Bosnia-Herzegovina, as a compound of ethnicities and territories, too).

Now, why do I claim that Mujanović has positioned himself firmly within the Sarajevo camp of political comradeship as characterized and criticized above? I will give you two quotes from his reply to my paper: ‘My personal preference would be for a two-thirds standard for implementing any future constitutional reforms (by which I mean, two-thirds of the population, rather than two-thirds of the three “constitutive” peoples for all the reasons I have previously outlined).’

Mujanović here simply repeats Izetbegović’s active policy prior to the Bosnian 1992 referendum for independence. The policy brought catastrophic results, fully alienated the Bosnian Serbs because it deliberately failed to include and address the ethnic principle properly, and it ended with an anticonstitutional declaration of independence as the required two-thirds majority was not reached.

And another quote:

I would prefer that vacuous ‘ethnic’ principles be scrapped as political ideals in BiH. Not because I am secretly agitating for ‘Muslim domination,’ but because I consider the very concept offensive and racist. I should like nothing more than if every significant government post in the whole of BiH were occupied by

a self-identifying Serb, provided they were actually qualified for the position and pursued responsible, responsive, and democratic policies, which reflected the interests of all the citizens of BiH. Nor do I have any issue whatsoever with people identifying any way they would like, provided this identification does not result in or is premised on the discrimination of any other individuals.

In other words, Mujanović finds ‘racism’ (which I thought refers to interracial relations!) in the ‘ethnic principles’ of Dayton, and the only self-identifying Serb that might be to his liking is, first, one whose ethnic identity is politically irrelevant and, second, one who must be very careful not to provoke by his self-identification as such an irrational feeling of discrimination on the part of other individuals. Contrary to Mujanović, I do not think that ethnic self-identification as such may be premised on discrimination—discrimination takes place between identities or against them, hence, you have to have a relationship between the identities, or self-identifications, already in place.

This has two important implications. First, I see no trace of the ‘embrace of the ideal of difference’ in Mujanović’s musings. For Mujanović, a ‘good’ Serb is one who, in a political sense, does not care about his own ethnic interest or identity. Hence, what we find in Mujanović is, strictly speaking, ‘the ideal of a politically tailored, politically irrelevant, and politically illusory difference.’ Second, as I already implied in my previous contribution, but now claim very straightforwardly: Mujanović simply emulates Izetbegović’s policy. Prior to the declaration of independence and the outbreak of the Bosnian War, Alija Izetbegović, with no shame or regret, did his best to persuade the representatives of the Serb people that he was ready to treat the people in the new state as individual citizens, but not as a collective agency and a constituent people with their own constitutional—both ethnic and political—rights.¹¹ Sadly, in some minds nothing changed since 1992.

11 For more detail on this, see Pehar (2011a, chaps. 2 and 3).

Finally, how can we explain the role of the international community, assuming that Mujanović and I represent opposed political camps, and even ethnic communities or constituent peoples, in BiH? For the longest part of the post-Dayton period, the international community, which here means the international power holders (the US, the UK, and the EU, but excluding the Russian Federation, which became more assertive only in the post-2006/2007 period), sided with 'Mujanović' camp, or school of thought, in BiH despite, and provably in violation of, the Dayton compromise.¹² This generated an expected resentment in the opposed camps, and produced or reinforced the sense of injustice. The non-Mujanović camps experienced the entire period as one of an unjust imposition, or of an unfair treatment caused by the informal alliance between the international power holders, on the one hand, and the Bosniak-Muslim representatives on the other. Thus, the war continued in the postwar period.¹³ However, keep in mind that two further developments took place.

First, the international community never reached the point at which it dared to abrogate the entity of 'Republika Srpska,' or to effect a deep, or really fundamental and 'revolutionary,' constitutional revision. The Dayton-based skeleton of BiH remained firmly in place. This means that the siding of the international communi-

12 This point is explained in Chapters 1-4.

13 For instance, this is what the chief architect of the Dayton agreement, Richard Holbrooke, in his Dayton Peace Prize acceptance speech, claims about the recognition of 'ethnic difference,' on which the whole structure of the Dayton constitution depends: 'When we say "ethnic" ... it's just a fancy name for "racism"—racism which, by the way, is not based on any racial difference; there is no difference between Muslims, Croats, and Serbs. They went their different ways through the history of the last eight hundred years in the Balkans, but they all intermarried, they all came from the same place, and so on' (Holbrooke 2005a). Apart from its highly questionable value as a historical account, Holbrooke's depiction is irreconcilable with the currently valid self-image of the constituent peoples of Bosnia-Herzegovina; here, one should emphasize two critically important aspects: on the issue of 'racism,' Holbrooke actually sides with Mujanović as well as with the 'Sarajevo camp of the revolutionary enemies of the Dayton agreement'; second, the key architect of the Dayton agreement views the key categories of the agreement as 'merely figments of imagination,' as purely fictive categories the acceptance of which involves a backward ('racist') mind and attitude that need to be overcome or radically transformed. This, again, is bound to act negatively and adversely on the process of the Dayton implementation, on which see more in Chapter 7.

ty with the Bosniak-Muslim element in BiH never reached the point of a support to the 'decisive victory,' a 'knock-out blow' to the Serb, or Croat, element in BiH. The state was preserved in the condition of 'simmering,' of a mid-level political conflict fed by the fundamental disagreement over the meaning and purpose of the Dayton constitutional blueprint, and feeding in turn a series of political crises centering on some specific, often recurring issues.¹⁴ In that process, the members of the international community toyed with all kinds of ideas: for instance, at one point in time they had, or claimed that they had, a totally unrealistic expectation of a massive refugee return to Republika Srpska; also, they time and again toyed with the idea that, to the Bosnian citizens, a nonethnic, civic organization of political life matters more than the life of ethnic affiliation, and that the ethnically oriented BiH parties will be defeated, or made irrelevant, easily to open the room to more 'progressive' or 'enlightened,' 'state- and multi-ethnicity-oriented,' parties. All those ideas were proved wrong almost as soon as their realization was tried, but they have been nonetheless propagated unceasingly in the post-Dayton BiH.

Second, the international community not only preserved the state of war between the constituent peoples; it also produced the state of war within the constituent peoples, by assisting some political parties more abundantly than others.¹⁵ Additionally, it did everything it could to retain control over the political elites who continued participating in the conflict-ridden power branches of Bosnian politics. This means that, despite its impositions and chang-

14 Here is a brief selection of such issues: the BiH/state military property, RS 'cultural and economic' representation abroad, the ECHR *Sejdić and Finci* verdict, the 2013 population census and interpretation of its data, NATO membership, relations with Turkey and Russia, the BiH election law, the future of the High Representative, the High Representative reports to the UN Security Council, the issue of the responsibility for the outbreak of the war in Bosnia, the role and position of 'Herzeg-Bosnia,' 'Željko Komšić' in the BiH Presidency, the ICTY indictments and proceedings, national holidays, the issue of the 'Islamic radicalism threat in BiH,' the work of the BiH Prosecution Office, the status of the town of Srebrenica, the issue of the RS referendums.

15 I offer several illustrations in Pehar (2017b).

es in the Bosnian constitutional architecture to the Croat or Serb disadvantage, the international community found a way to encourage the Croat and Serb political elite to remain engaged in Bosnian daily political life and keep supporting by their work, and by participation in general or local elections, the Bosnian branches of government at both entity and state levels. The next three chapters of the book scrutinize the key players in the field, outlining and elucidating the discursive and political means and notions that caused Bosnia-Herzegovina to regress to the condition in which it finds itself today.

PART II

Discursive Mechanisms of Political Power

The High Representative—An Engine of Progress?

*For the subjects to accept the potestas absoluta
of the sovereign requires that they regard him with
terror, as indeed is the case of Medusa and Dionysos.*

*Hobbes's monster state and monster sovereign
end up in unorthodox company: among the demons,
gods and idols of the heathen.*

— Tralau (2007, 74)

The processes and mechanisms accounted for in Part I are, obviously, primarily legal as they concern legal documents. However, equally obviously, the analyses offered in Part I cannot be reduced entirely to the legal field. They are, in an important part, political as well. By stating that they are ‘political,’ I mean to state, as one normally does in similar contexts, that the process of interpretation, as adopted by the empowered interpreters (for instance, the Bosnian Constitutional Court), cannot be fully justified, or explained, by legal facts and propositions (plus, of course, general epistemological, widely acceptable, means and mechanisms). One understands that one needs to add some extra factor to comprehend fully the motivation of those who passed a legal decision embodying a specific, arbitrary and unjustifiable, legal interpretation. Take Cicero’s Cleomenes as an example: his reasoning on the ‘*triginta dierum*’ clause cannot be explained exhaustively in legal terms—one has to add some words concerning Cleomenes’ political, or extra-legal, interest or factor. Similar considerations apply to the 1857 *Dred Scott* decision by the US Supreme Court. As to post-Dayton Bosnian politics, by now I think I can safely conclude that the legal bodies, or institutions, concerned did serve,

to an important degree, pro-Bosniak-Muslim politics, or extra-legal factor, through their pseudo-legal proceedings, conclusions, measures, or rulings.

In this part of the book, my aim is to analyze in more detail some key components of the extra-legal factor, or the extra-legal part of the political, and narrative, mechanism at work in the post-Dayton Bosnia. I will show that the key aspect of the extra-legal part is placed in the figure of the High Representative. This figure is very detrimental, even mortally dangerous, to BiH viewed as a free, democratic, and independent state composed of its equal constituent peoples. However, it is also a figure that is nonetheless supported by the Bosniak-Muslim constituency of BiH (see Pehar 2011a, 145–6; Pehar 2011b; and here Chapter 8). Additionally, and most critically, it is a figure that, throughout the post-Dayton period of Bosnian history, the US continuously invited to act aggressively, or vigorously, toward ‘the weakening of the Bosnian entities and the nationalist parties,’ in favour of ‘the state and the central governmental powers,’ and also ‘to punish the obstruction of Dayton obligations and OHR [Office of the High Representative] directives’ (Western and Serwer 2000).¹ In other words, the extra-legal aspects of the Dayton peace implementation as a continuation of the ‘state of war’ can be considered only through the prism of the concerted acting involving US foreign policy toward, and narrative on, Bosnia, the BiH Constitutional Court, the Organization for Security and Co-operation in Europe supervision of the Bosnian elections (supported again by the OHR), and, finally, the High Representative him- or herself as a pivotal figure or institution.

Hence, it is of critical importance for the understanding of the tenor of this book to realize that, according to the key argument

1 Note that, here, Western and Serwer (2000) directly present the High Representative as a body that, first, issues directives, second, decides whether an internal BiH body obeys/follows, or violates those, and, third, enforces a punishment when the directives are not followed; in such a sense, the High Representative is a full and total negation of the rule of law in BiH, and also a full negation of the BiH judicial sovereignty—this perspective has not a slightest anchorage in the text of the Dayton peace agreement (Annex 10 on the role of the High Representative).

proposed in this part, the US managed to retain control over the process of the Dayton peace implementation primarily by making sure that one figure, the High Representative, could act arbitrarily in the theater and get away with it. As scrutinized in this chapter, the US made sure that the figure did not need to explain why s/he viewed some act as an instance of legitimate Dayton implementation, or of the Dayton violation; and thereby the US, too, made sure that it also did not have to do any explaining. This figure, as I explain later in the chapter, was fully in the hands of the US and was loyal only to the 'one remaining' superpower, as attested also by, for instance, Western and Serwer (2000), Ashdown and Holbrooke (2008), Petritsch (2011), and Woehrel (2013). However, more interestingly, the power of the High Representative seems to have always been primarily of a discursive nature: when it started provoking a more resolute negative response by the local actors and even some international ones, the US, and the 'international community' at large, prudently decided to retreat and put their interventions in Bosnia on hold (Parish 2007; Arbour 2009; Woehrel 2013).²

Also, as I explain in this chapter, by the time the local, and some international, actors started opposing the High Representative more aggressively, the institution had already inflicted enough damage on Bosnian internal relations and helped the US to preserve the Bosnian 'pot' in the condition of a continuous war of words and ideas. As to the issue of why the figure of the High Representative, as drawn arbitrarily by the US for the post-Dayton Bosnia, was likely to help the US preserve BiH in the undesirable condition of 'peace as war,' Sections 6.1 and 6.2 of this chapter will propose some fundamentally discourse-ethical, hence as well extra-legal, contentions and elucidations.

2 With one major exception: the formation of the 2011 BiH Federation 'Platforma' government, on which see Vukoja and Sitarski (2016, 257–260).

6.1 Four introductory fictions

Let's start with an important legal fact that a large majority of commentators or analysts never seem to have taken seriously: in 1997 the High Representative assumed all the constituent powers in BiH, supporting the power expansion by the claim that this was in accordance with the Dayton General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP). The decision he made was, and could have been only, his own. It, for instance, could not have been a decision by the signatory states to GFAP, or by the witness states, simply because those states did not have a direct and independent role as a part of the process of peace implementation (except in regards to the 'special parallel relations' that is a discretionary right of the cosignatories, the Republic of Croatia and today's Serbia). The only body that had a more direct and independent role was the High Representative (HR) himself. This is why, at the 1997 Bonn conference, the Peace Implementation Council (PIC) simply 'welcomed' the decision by the High Representative to use these broad powers. Today we call these powers the 'High Representative's Bonn mandate' even though the PIC did not grant the powers but simply welcomed his assumption of them. They include the power to dismiss elected officials, to impose or annul laws in BiH, or to take any other measure as he deems appropriate.

In other words, the PIC cannot be viewed or interpreted as a source of legitimacy for the decision. It was not the outcome of a debate, discussion, or a mechanism of democratic decision-making; it was an extension of a body that sprang from the body itself.³ Hence, in theory, no High Representative, acting under the Bonn mandate as he himself assumed it *ultra vires*, has the duty to explain his decisions to anybody. Under the Bonn mandate, he is a self-constituted institution that founded itself through an interpretation of GFAP

3 Also, keep in mind that the PIC is not a body defined by the Dayton agreement documents/annexes; it was formed at the London post-Dayton conference dealing with the mechanisms of the international community's involvement in the Dayton peace implementation (OHR n.d.).

which is not, and does not have to be, explicit. The official grounds of the decision by the HR have never been publicly offered in the form of a complete legal interpretation. Carlos Westendorp, the HR in 1997, made comments to the local press that partially explained a decision he made in his role as HR. However, his comment, which I reproduce and criticize below, hardly amounts to a legal interpretation, let alone a justification. As I claimed elsewhere, right at the start it was impossible to provide for a sound legal justification of the Bonn-powered HR's self-constitution.⁴

In 'Legality and Legitimacy,' a masterful legal-political analysis Carl Schmitt published before the disintegration of the Weimar Republic and the rise of Nazi Germany, Schmitt refers to the possibility that is always open to the party winning an election: the party can use so-called 'supra-legal premium on political exercise of power.' It can direct the implementation of a constitutional framework in a direction that involves the violation of the right of 'equal chance' to the remaining parties simply because it enjoys the privilege of making the first move and because all legal remedies (for instance, an appeal by a minority party to the Constitutional Court) necessarily come late. Then the victorious, and revolutionary, party can take its time to carry out a radical alteration of the constitutional order.

As Schmitt emphasized, the party can effectively rely on the executive branch of power that acts through decrees, orders, or ad hoc decisions to undermine completely the existing constitutional order and assume all governmental powers (Schmitt 2004, 31–35). This is exactly what the German National Socialist Party did in 1933. Keep in mind that Schmitt discussed a possibility in principle; he referred to a threat that shadows all democratically elected governments. The only thing that is really required for the ruling party to materialize such a possibility is to remove its support for the foundational values of a constitutional-democratic type of government (such as justice, peace, stability, the rule of law, and the separation

4 For more detail, see Pehar (2012b); see also Baros (2010).

of powers), or to reinterpret such values arbitrarily, according to its own will, and endorse, and impose on others, the illusion that its own interest is indeed a public or common good.

We should note especially that the HR ascribed to himself primarily the role of the executive power, but he acts in the role of an executive that outgrows, and encompasses, both legislative and judiciary power. In the hands of the HR the executive power is actually ‘discharged immediately.’ His decrees must be implemented with no delay and they have the force of unquestionable, nonopposable execution that is not channeled through institutional intermediaries.⁵

Now I will remind the readers of the words in which Carlos Westendorp, a Spanish ambassador, explained his new role as HR under the terms of the Bonn mandate. He stated that, under the GFAP, as the HR he ‘has been empowered to interpret his own powers’ (Westendorp 1997). We, naïve BiH citizens, did not consult the GFAP at the time in order to check the actual wording of the provision in the agreement. Of course, the provision is not there while one that distantly echoes it—‘The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement’ (UN General Assembly 1995, Annex 10, art. 5)—should be given an entirely different meaning or interpretation. However, we should note a more important matter: all institutions within a constitutional-democratic system are generally, and automatically, endowed with the power to interpret their own powers under the constitution. Actually, without such a power of self-interpretation, no institution is able to function properly.

However, the idea that Westendorp smuggled through his official explanation is entirely different: it is the idea that the HR, under An-

5 Related to this, in late 1920s Carl Schmitt and Hans Kelsen famously debated the question ‘Who ought to be the guardian of the constitution?’ Kelsen advocated the view that such ‘privilege’ ought to be attributed to the constitutional/supreme court, the supreme legislative body, while Schmitt supported the view that it ought to be attributed to the president as the supreme executive power. See, for example, Schmitt (1929); for my own take on the issue of ‘ultimate constitutional interpreter,’ see Pehar (2014a).

nex 10, gives an interpretation of GFAP in its entirety that is, by definition and a priori, superior to all the other, possibly competing interpretations. In other words, the core of Westendorp's explanation does not concern 'the power of interpretation of one's own powers,' but 'the power to impose one's own interpretation as inherently, automatically superior, independently of the reasons offered.' For a start, let us notice that the idea cannot be reconciled with the intellectual pillars of democracy. There cannot be a document, a constitution, or a law, that could found such an institution and still be called a document charting a democratic form of government.

The considerations given thus far can be presented in the form of a fourfold thesis: the Bonn-powered HR is based on four fictions: the first one is the fiction of self-constitution or self-grounding; the second is the fiction of the necessity to abide by the HR's decisions without the possibility of appeal; the third fiction is one of the immediately executive character of his decrees; and the fourth is the fiction of his a priori interpretive superiority. Why do I call those things fictions? My reason is because such a body cannot exist, or be valid, within any contemporary frame of democracy. There cannot be a body that self-declares its own mandate and powers; there cannot be a body whose word, or ruling, is automatically executed. (For instance, in all normal democratic systems, a judicial decision is subject to strict procedures of verification and execution in which the legislature and judiciary take part, too, such as the members of the parliamentary commissions or the members, or appointed representatives, of government.) Besides, the fiction of the immediately executive character of this power is based solely on the presence of a foreign military force in BiH. Also, there cannot be a body passing the decisions the legitimacy of which could not be questioned, or criticized or opposed, under certain conditions. Finally, there cannot be a body to which all other bodies should give a blind hermeneutical trust in the sense of the body whose interpretations not only of his own, but also of the other bodies', powers are so perfect that it must not be even called to offer the explicit reasons for its interpretation(s).

The topic of the origins of such fictions, or of the motivation that was driving the international community at the time, deserves a separate analysis that will be continued in Chapter 7. Here I will emphasize first some simpler, emotion-related aspects. In late 1997 BiH was, predictably, viewed as an unstable and conflict-ridden social or political entity in which the peoples or citizens had not yet reached the desired degree of reconciliation that enabled them to jointly run their own state. In such a context the idea that almost immediately arises is one of the external mediator, or governor, who will keep things in control; an idea of a 'fourth,' unemotional, impartial and unbiased, party who can pass some sufficiently wise and compromise-based decisions, and is strong enough to impose them.

Putting aside such emotion-laden aspects of the need to endorse the fourfold fiction of the Bonn-powered HR, the fiction could have been very early, perhaps right at the start, viewed as at least potentially detrimental. It is clear that a change that is imposed externally, by an outside agency, has a shorter expiry date than a change that comes from within and involves actual transformation of the local agents in the sense of their political culture or democratic and institutional competence. Furthermore, the conflict is not dangerous or detrimental in itself. It can be detrimental if it is not resolved through a reasonable dialogue, or when there is no readiness to propose and endorse a compromise, or when one of the parties rightly sense that their participation to the conflict is not on an equal footing.

On the other hand, the conflict may also provide a strong incentive to search for creative solutions, and institute some new social and political forms of government that may even inspire some other states, nations, or political decision-makers. Such solutions are superior to those imposed by the Bonn-powered HR regardless of the latter's assumed intelligence, fairness, or benevolence. Now, in light of such creative solutions, the disadvantage of the HR's impositions can be reduced to the fact that an externally tailored, and short-term, arrangement is adopted instead of a locally produced,

and long-term, one. In my mind, the idea that the HR's interventions are flawed in such a sense is a weak thesis.

In the analysis offered here I advocate a stronger thesis: for a number of clear and pertinent reasons, the acting of the Bonn-powered HR is inherently damaging to Bosnia-Herzegovina as a state and as an association of the entities—Bosnia's federal units—and also of the peoples and citizens.⁶ This thesis could have been easily and, with much better consequences than today, endorsed in 1996 or in early 1997. The fact that it was not endorsed then may be interpreted in at least three different ways: as an effect of incompetence, or as an expression of the lack of benevolence, or as a combination of the two. However, regardless of the issue of a proper explanation of the fact, the effects of such misapprehension are today very visible and easily discernible (see Sections 6.2 and 6.3). Additionally, it is now clear which directions the future developments are likely to take, which is the theme of my relatively brief fourth reflection (Section 6.4).

6.2 The High Representative against democracy, the rule of law, and conflict resolution

The High Representative acting under the Bonn mandate is caught in a sad and cognitively unsolvable condition. S/he quasi-justifies his mandate by calling on democratic principles and claiming that the mandate serves the promotion of democracy in BiH. However, it requires no effort to realize that the Bonn mandate cannot be at all reconciled to the principles of democratic government. The crucial point to grasp is not only in the principled discord between the

6 Hence the key thesis of this essay is opposed to one advocated by Henda (2012). I consider Henda's arguments as based fully on the ideology of liberal interventionism—for example, on p. 30 he frames the debate between those who support the Bonn-powered HR and those who oppose such HRs as a debate between 'Bosno-philiac' and 'Bosno-phobic' views. His classification puts me into the camp of 'Bosno-phobiacs' that includes David Chandler, Robert Hudson, Gerald Knaus, Miroslav Baros and Matthew Parish, among others.

mandate and democracy; it is also in the ability of the mandate to effectively prevent the development of democracy, that is, to act counter to all the key components of the democratic ethos. If we envisage such an ethos as an assembly of virtues, rules, ideas and practices that support the evolution of democracy, the Bonn mandate itself has an adverse and discouraging effect on such an assembly. It may sound somewhat paradoxical, but is nonetheless true that the mandate relies on a premodern communist mentality that marks a significant portion of Bosnian-Herzegovinian, primarily Bosniak-Muslim, political elite and citizens, with a notable exception of at least a half of the population. Additionally, such a mandate both reinforces and regenerates such a mentality.

A few examples suffice here to bring home the key point. Drawing on the July 2000 BiH Constitutional Court (to which a majority can be normally formed only if foreign judges tilt the balance) ruling, in April 2002 the HR issued a decision imposing amendments on the BiH Federation and the Republika Srpska Constitutions. The decision was declared at the end of his mandate, when he was packing his bags to leave Bosnia, which is why the decision was wittily nicknamed the 'airport decision.' From the perspective of democratic ethos, and regardless of some likely ethnicity-related queries (let us forget about the issue of, for instance, Croat constitutionality), it is obvious that the decision cannot be reconciled with the democratic ethos. In a normal democracy, such a decision on constitutional amendments needs to be drafted, debated, redrafted, formulated, and ultimately passed by the parliament. Perhaps the parliament would decide not to adopt such a decision, even if the Court's ruling implied that the decision was in order, because every parliament in a democracy enjoys the right of its own interpretation of a constitutional frame. Now, even if the parliament decided to accept the decision by the Constitutional Court as binding on all, it is its own sovereign right to discuss, and interpret, the decision on its own, that is, parliament's, terms.

A functional democracy can be contrasted with a nonfunctional one due to the ability of the former to pass decisions based on con-

sensus, or on some other method of democratic decision-making preceded by a free, fair, and open and transparent public deliberation, which can thrive only on the foundation of the democratic ethos. A parliament to which a decision is imposed from the outside is not a democratic parliament. Contrasting the normal, democratic processes of amending of a constitution with the way the HR simply announced the amendments to the Republika Srpska and the Federation constitutions, one can with no effort draw the conclusion that BiH has nothing to do with democracy. Constitutional amendments were imposed, but, from the viewpoint of democratic theory and practice, no amending took place.

Petritsch was well aware of this: after his departure from the post, he stated publicly that the import of democracy in BiH was ‘tried by the means of dictatorship,’ that he personally ‘sensed sadness every time’ he had to impose a decision, and that he was also aware that, by imposing the laws, he ‘was preventing the evolution of democracy in the country.’⁷ Putting aside the emotional tone that may be misleading, his statement on the nondemocratic, or even antidemocratic, means of the spread of democracy demarcates clearly one fundamental and inevitable aporia involved in the institution of the Bonn-powered High Representative.

Or, think of the notorious example of today’s High Representative, Valentin Inzko, and his decision to suspend the decision by the BiH Central Election Commission—which was established by a decree of Lord Paddy Ashdown as HR—in March 2011. Inzko had, *de facto*, blocked a democratic process (Vukoja and Sitarski 2016, 257–260). One can compare this with the blocking of a mechanism which is part of a larger institutional-democratic package, and which makes sense only as such a part. Following the Central Election Commission decision, some other bodies were supposed to give their own view of the problem. This means that Inzko not only blocked, and annulled the

7 See Petritsch (2011, 33); however, compare that statement to Petritsch’s farewell address (Petritsch 2002).

results of the work of, a single body; he effectively blocked the work of several other bodies that naturally operate within a larger democratic compound which reminds them unceasingly of the need and desirability of democratic accommodation, compromise, and sound judgment. In other words, Inzko's decision deprived the local institutions of a potentially important and useful exercise in democratic and constitution-based methods and procedures of decision-making.⁸

This leads us to the next, and equally important, issue: the Bonn-powered High Representative not only adversely affects the development of the democratic ethos in BiH; he also has a detrimental, in fact, a highly preventive, effect on the rule of law in BiH. The body that is not duty bound to clarify explicitly how its decisions relate to the laws binding on all cannot be beneficial to the rule of law, not only in BiH but in any other country, too. The body embodies an example of the license to act arbitrarily and operate unbound by a legal frame, that is, *ultra vires*. For instance, if one-third of seventeen amounts to five in a country, as Inzko's decision implies,⁹ then one could hardly believe that the population of the country would be motivated to act in accordance with the law—so the very content of the law has been treated with disdain. Hence, the connection between the 'logic' of the High Representative, on the one hand, and a dismissive attitude toward the rule of law, on the other, can be easily established. Examples are many, but here I will provide two that pertinently illustrate my key contention.

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- 8 See also Kostić (2011). It is interesting to note that Kostić emphasized the following: 'During his lecture and visit to the United States Institute of Peace on 10 May 2011, HR Valentin Inzko announced that he was to withdraw his decision upon his return to BiH in order to normalize the situation in FBiH. The media in BiH broadcast this news, yet upon his return the HR accused the newspapers of misleading the public, despite the fact that his USIP lecture is a matter of public record with a recording available online' (2011, 129n29). Unfortunately, as of 27 September 2014 there is no audio record of Inzko's lecture at the USIP webpage (but on the webpage there was a dead link to the record!). In October 2018, USIP (2011) is the only remaining vestige of Inzko's 2011 visit to USIP.
- 9 This is so because Inzko's March 2011 decision supported the party that formed the Federation government based on five Croat votes in the Federation House of Peoples, despite the amended constitutional provision that the formation of a BiH Federation government must be supported by the vote of no less than one-third of the total number (seventeen) of the Croat representatives to the Federation House of Peoples.

Take the cases of the removal of the democratically elected officials. In a normal country that operates under the rule of law, such a removal needs to take place in the form of a relatively complicated cluster of legal and institutional procedures. As a minimum, the targeted official ought to enjoy the right of a fair hearing; s/he should at least utter a number of propositions to try defending him- or herself; or, in the more modern and evolved forms of democratic government, s/he should be assigned a pro bono counselor. In Bosnia-Herzegovina such ‘complications’ must not be tried when it comes to the decisions by the HR to dismiss or remove, or ban, officials not only from the official posts, but also from participating in political life in any other form. Thus one can easily recognize that such decisions by the HR involve a flagrant violation of fundamental human rights.

For instance, the decision to ban Edhem Bičakčić in 2000 was passed simply for political convenience. After Fahrudin Radončić, then the owner of *Dnevni Avaz*, an influential Bosnian daily, changed his political course and put his daily into the service of the Social Democratic Party—which the international supervisors of Bosnia (like in 2011 within the BiH Federation) at the time misrepresented as a potential source of a true multiethnic democracy in BiH—Bičakčić called for a judicial inquiry to check Radončić’s tax-payment history. This is all High Representative Petritsch needed to ban Bičakčić due to the ‘undermining of the GFAP.’

With regard to this issue, too, the BiH Constitutional Court announced a ruling in 2007 to the effect that such removals from the office by a High Representative involve the violation of basic human rights. However, by another decree, High Representative Schwarzschild declared the Court ruling nil and void (Parish 2007, 16). Again, one can easily see why the institution of the High Representative must have a detrimental impact on the notion and practice of the rule of law. In order to protect the fundamentals of his Bonn mandate, the HR has to annul a decision by a judicial summit of a

country,¹⁰ but he is not in position to annul it by international human right norms or some other plausible public reasons.

Now we can move to the third, and probably the most important, consequence of the HR's Bonn mandate. It is not difficult to demonstrate that the HR has an aggravating effect on the very dynamics of conflict within BiH. In a democratic country, the conflict of social, economic, political, or ideological nature is a welcome fact. It is only through the experience of a conflict that the ability of a democratic system to respond to conflicts peacefully and constructively can be tested. Of course, one of the fundamental prerequisites of such an ability lies in a democratic and peace-loving culture generally, or, more specifically, in a culture that promotes dialogue in the sense of a confrontation between some social and political attitudes or ideas in the form of a reasoned debate (aiming normally at a compromise or a solution that all parties to the conflict should find satisfactory and supported by the most plausible reasons). However, such a dynamic is unlikely in BiH primarily because of the presence of an external party that guarantees a temporary stability in the form of a decision that will be made regardless of the ability of the local parties to arrive through dialogue at a compromise-defining solution.

In other words, at least one of the local parties, and possibly all of them, are demoralized by the very presence of the HR. They are deprived of a potentially important inner inducement to try, through direct dialogue, to arrive at the locally constructed solutions binding on all the parties in the negotiating process. In such a sense, the Bosniak political elite carries a special responsibility because, considering the past actions of the HR in BiH, they are used to the expectation that the HR will continue imposing solutions regardless of their own will to create a dialogic relationship with the interloc-

¹⁰ In 2011, one official from the Office of the HR told me that 'the HR would soon start permitting the BiH Constitutional Court to revise his [HR] decisions.' The official gave me no hint of his possible realization that such permission is fundamentally irreconcilable with the theory and practice of the rule of law.

utors from RS or within the Federation. In their eyes, the HR has become a *deus ex machina*, or ‘Santa Clause,’ as some officials from within the Office of HR cynically call him, who quasi-guarantees the sovereignty and indivisibility of the country, which in reality cannot stand on its own.

Following his assumption of *ad libitum* powers, Carlos Westendorp supplied the most plastic description of such a constellation:

[H]e [Westendorp] once told a Bosnian periodical that if Bosnia’s elected officials cannot ‘agree about some decisions, for example the passports, the license plates, the flag...I will stop this process of infinite discussions. In the future it will look like this: I will give them ... a term to bring a certain decision, that is, to agree about some decision. If they do not, I will tell them not to worry, that I will decide for them.’ (D’Amato 1999)

Now we can clearly see where the key problem comes from. The parties need not worry where the negotiating process takes them. This means that they are indirectly encouraged to relate to the process without a serious commitment or responsibility. This further means that the incentive to self-limit ambition is effectively removed, and that the parties are free to continue pressing maximalist demands, or claims, should they wish so.

In other words, this means that the HR signals directly to the local parties to continue with their conflict without worrying about their inability to settle their differences by the means of negotiations and peaceful actions. Their inability to do their job ensures the continuation of his job. This is why the figure of the HR has such a detrimental effect on the internal dynamics of conflict within BiH. He simply freezes, and occasionally unfreezes, the conflict while the local political actors and elites are implicitly deprived of the incentive to try making real progress in terms of their fundamental attitudes to the conflict. The HR prevents the local parties from developing a crucial and, for the democratic ethos, indispens-

able conflict-related virtue: to seek and negotiate a compromise on the premise that the failure to perform well in such negotiations is likely to have a severe and lasting impact on their own life. The conclusion of this reflection leads us immediately to the next, which deals with the impact the HR has on the dynamics of a wider conflict which involves not only the local, but also the global actors in Bosnia-related politics.

6.3 The High Representative and global political relations

As Étienne de La Boétie masterfully explicated in 1549, every tyrant, as the holder of absolute power, forms a pyramid of influence over those whom he rules (La Boétie 2001, 44–47). He primarily leans on a small number of supporters and followers ranked lower than him, who exercise an approximately equal amount of effective power. Those followers then lean on a larger number of their own followers or supporters who again exercise an approximately equal amount of power. Such a pyramid extends to the lowest ranks of common people, artisans and peasants, who represent the bottom stratum of society. This stratum is actually the least burdened by the fact of tyrannical power—the people at the bottom carry out their normal jobs, while the tyrannical power appears to them only in the form of those who occasionally extract or collect taxes. The highest ranked are actually the most burdened by the power: they need to attend to those ranked lower than them, and they also need to follow closely, and sometimes make a wild guess about, erratic changes in the tyrant's attitudes. Besides, the highest ranked supporters need to display a higher degree of ideological loyalty to the tyrant; hence the nature of the downward influence varies from stratum to stratum. In the middle strata such influence may be based entirely on a kind of tangible interest. Also, one should note that, legitimacy-wise, the strength of influences, from the top of the pyramid downward, gradually decreases; for those positioned at the lowest

ranks, the issue of which supreme power is actually legitimated normally makes no difference. However, for those positioned close to the summit, this issue is of the utmost importance and their bare existence often depends on it.

I quote this part of La Boétie's theory of 'voluntary servitude' to emphasize the fact that the High Representative to BiH, under the Bonn mandate, is not a dictator in the classical sense of the word. He is a dictator carrying additional baggage, or an institution with a legitimating chain of influences that does not extend only from the top to the bottom of the Bosnian-Herzegovinian citizenry, but also points upward to the ranks that actually stand higher than the HR. In other words, the HR is supposed to act along the political guidelines of the PIC, especially the PIC Steering Board, which represents the voice of major global powers, including the US, the UK, Germany, France, Turkey (on behalf of the Organisation of Islamic Cooperation), the Russian Federation, and the EU Presidency. Of course, the ideal condition would be one in which the PIC Steering Board members form an inverted pyramid, with the top of the pyramid acting as a hidden source of the HR's actions. Unfortunately, this is not so. The internal relations at the PIC have no discernible geometric shape, and today one can even plausibly argue that the PIC consensus concerning the future status and behavior of the HR has either already unraveled or is in the process of unraveling.

Those who closely follow the process of implementing the GFAP under the heavy influence of the HRs should not be caught by surprise. The High Representative was exploited by American foreign policy makers to take the process in a direction not foreseen by the original wording of the framework.¹¹ Such misguidance of the Dayton implementation, and the subsequent violation of both the letter and spirit of the GFAP, had two essential effects: first, the BiH Federation, one of the two BiH entities, was transformed into an entity with a de facto Bosniak-Muslim majority domination at the cen-

11 See Chapters 1, 2, 3, and 7.

tral level of government, and also in the sense of domination of the Bosniak ethnic representation through the cantonal levels. Second, at the expense of the entities, the BiH state was illegitimately given additional powers that were originally, according to the letter of the Dayton Constitution, intended to be exercised by the entities—that is, if one founds one’s legal reasoning on the premise that the *lex specialis* supersedes the *lex generalis*,¹² and if the premise effectively guides one’s interpretation of the GFAP. This process, run primarily by the US with some of its European allies, including the UK, was bound to cause a fair amount of friction and disagreement within the EU, and between some EU member states and the US, and also within the PIC itself.¹³

The American ‘mediators,’ and de facto instructors to the HRs,¹⁴ justified this process by an allegedly American system of liberal values. They kept claiming that they were supporting Bosnia’s multi-ethnic character, or BiH democracy, or the individual, in contrast to the collective, rights of its citizens primarily.¹⁵ However, their in-

12 According to the *lex specialis*, the small number of the powers of the central BiH government, under the Dayton Constitution, are put in exact terms; the remaining powers are originally placed in entities. In the course of Dayton negotiations, and at the start of implementation of GFAP, Holbrooke emphasized that the Dayton Constitution forms a community based on the following formula: two strong entities, one loose central government. Moreover, under the Dayton Constitution, the potentially additional central powers, for instance, those that have something to do with ‘the international legal personality of BiH,’ are put in general and vague terms, and are thus a subject to interpretive controversy and conflict; hence, at their best, the latter have the status of a *lex generalis*.

13 For a more recent example, see Brunwasser (2011).

14 A High Representative with a broad Bonn mandate is a necessity in the condition when one aims at imposing an interpretation of a peace treaty that deviates from both the letter and the spirit (or, more precisely, the reasons) of the treaty; the Bonn-powered High Representative, who adheres to the letter and spirit of the treaty, is not a sensible category because, in the condition of his adherence to the letter and spirit of GFAP, the High Representative should not need the Bonn authority as his pre-Bonn authority would be sufficiently safeguarded by his reasons and reason-supported interpretations. One of the most important facts about the decrees by the Bonn-powered High Representative is in their complete lack of explicitly formulated, understandable, and generally acceptable reasons for interpretations.

15 This thesis (on which see more in Chapters 1 and 7) is simply a misrepresentation of facts—whoever is aware of political values that inspired the American founding fathers is also aware that the American Constitution was founded on the need to prevent two major troubles: a potential tyranny of a majority over a minority and a potential concentration of excessive powers within a single governmental body that would replicate a ‘tyrant’ or a ‘monarch.’ The notion of ‘BiH constituent peoples’ matches perfectly the former aspect, whereas the latter one,

terference has in reality turned a Federation people, the Bosniak-Muslim, into a fundamentally constituent one, while the other, the Croat, was turned into a 'constituent minority,' against both the letter and the spirit of the GFAP. American interference also alienated a large portion of the Serbs in Republika Srpska who are aware that the weakening of Republika Srpska's relative power implies the weakening of a relative Serb influence in their role of the third co-constituent people to BiH.

However, from 2006 onward, developments took a new turn. HR interventions began to deepen and aggravate to a higher degree the conflict within BiH, but more importantly, they commenced acting as a serious conflict-generator within the PIC itself. The official idea, which was to use the HRs as a primary means of stabilization of the relations within BiH, produced a major side effect that caused global relations to move to an opposite direction. Due to the HR's interventions over a longer period of time, a conflict emerged at the PIC, which then caused the worsening of the conflict within BiH, too. This was fully predictable—the BiH parties were fully aware of the PIC members' attitudes to the problem of the GFAP implementation, and they treated some of the members' attitudes and positions as both a source of counseling and a promise of an at least informal alliance.

One should also realize that, as a part of the same process, the figure of the HR had been delegitimized. The fictions on which the status of the HR depends are increasingly viewed as nothing but fictions. The HR is thus increasingly considered as but a part of the weaponry employed in a global struggle over the GFAP implementation without an inherent ethical or legal validity. Hence, as a part of the same process, it was brought to the awareness of many participants and observers that the HR is not a self-instituted and infallible highest instance of political and legal decision-making, and

which is also supported by the theory of inalienable rights and liberties from the Declaration of Independence, cannot be at all brought into harmony with the institution of the Bonn-powered HR.

that he is neither an 'immediate executive power' nor 'a supreme interpretive authority.'

Year 2006 marks the period of a critical juncture. It was the year when Paddy Ashdown, the most aggressive of the High Representatives, ended his mandate. Barely a month after the Parliamentary Assembly of the Council of Europe, in June 2004, hailed the fact that the number of the HR's interventions decreased, indicating an evolution of BiH democracy, Ashdown 'pulled out the gun' and, by a single signature, removed 60 Republika Srpska officials at various levels, due to their, as Ashdown explained, 'lack of cooperation in bringing Radovan Karadžić to justice.' His move was rightly interpreted as an assault on both Republika Srpska and the GFAP. The detailed account of the complications that Ashdown's measure brought about is unlikely to be published soon.¹⁶ However, as already mentioned, at least it has become fully visible that the HR interventions not only aggravate directly the conflict within BiH, but also have an international, and negative, spill-over effect and threaten to deepen, or worsen, the conflict at the international level, which then again backfires on Bosnia's internal relations.

It is important to emphasize that, following the end of Ashdown's mandate, the PIC Steering Board decided to start preparations for the closure of the Office of the HR, that is, of the end to the Bonn mandate. The decision was explained by the thesis that it would be in the interest of all for BiH to take responsibility for itself and that, following the period of the Dayton implementation, the time has indeed come for the period of the Euro-Atlantic integration (OHR 2006). This decision was passed officially on 23 June 2006, and I am almost certain that the Russian Federation secretly threatened to use their veto in the UN Security Council against the appointment of another High Representative due not only to Ashdown's massive ban, but also to the way the GFAP was implemented by that point.

¹⁶ As to the heat this created within the Parliamentary Assembly of the Council of Europe, see Logan (2004).

It was probably agreed behind closed doors that the start of the process of the closure of the Office of the HR would be one of the key conditions for the Russian nonuse of veto powers at the UN Security Council. The problem is that, prior to his departure in February 2006, Ashdown persuaded the then chief EU negotiator for the EU enlargement to add a special condition to the list of conditions BiH needs to meet to qualify for the stabilization and association agreement with the EU: the creation of a unified police force with the mandate of operating throughout BiH territory, which, however, lacks a foundation in the wording of the GFAP (Parish 2007, 19).¹⁷ In other words, Ashdown thus managed to regenerate once again both the conflict within BiH and the conflict within the PIC.

Eight months after the 23 June 2006 decision to prepare for the closure of the Office of the HR, and a few months before the departure of Christian Schwarz-Schilling, a HR who was expected to mark the end of the era of 'international protectorate' in BiH, on 27 February 2007 the PIC Steering Board postponed the decision, and the mandate of the HR was officially extended for the period of over a year, by June 2008, at which point the PIC Steering Board now stated to aim for OHR closure. However, in a communiqué of the PIC Steering Board dated 27 February 2007 (OHR 2007), one can easily recognize that the international consensus supporting the Bonn mandate of the HR has in fact unraveled as the Russian Federation added a dissenting opinion to the document. Russians signaled officially and clearly, by a reservation clause within the given diplomatic frame, that no further consensus on the need for the Bonn-powered HR was formed.

One should also give consideration to two equally important developments: on two occasions, in 2007 and 2011, Republika Srpska succeeded in delegitimizing actions of the HRs. In the first case, it managed to block Lajčák's 19 October 2007 decision on a change of

17 Also keep in mind that Holbrooke explicitly stated that, originally, the following should be singled out as 'imperfections of the Dayton agreement': '[W]e [the US and European mediators] allowed three armies ... allowed two police forces to exist in the country' (Holbrooke 2005a).

the ethnic quota required to pass an official veto at the Council of Ministers and at the BiH Parliament (Parish 2007, 20–21; see also Borić 2008). In the second case, in 2011 Dodik managed to evade the authority of HR Inzko and to reach an independent agreement with Catherine Ashton, the High Representative of the (European) Union for Foreign Affairs and Security Policy, concerning the need to reform the BiH state judicial bodies.

I will draw this reflection to a close with an analogy. In his groundbreaking 1576 contribution to the modern theory of sovereignty, *The Six Books of the Republic*, Jean Bodin gives an account of an old Tatar custom and ritual of the appointment of their king:

When their king passes away, the prince and the people who enjoy the freedom of election choose one among the king's kin as they will, except that the person has to be a son or a nephew; and then they put the person in a golden throne and address him in the following words: 'We ask you, and plead with you, to be our king.' To this the king-elect replies: 'If this is what you demand from me, then you ought to be ready to do as I command. When I command that someone is to be executed, they have to be executed right away and the whole kingdom needs to be placed in my own hands.' To this the people reply: 'Let it be so,' and then the king continues as follows: 'As it comes from my mouth, my word shall be my sword,' to which everybody submits. Following this, they grab the king, take him off the throne, and then place him on a wooden board on the soil, after which the princes tell him the following: 'Look upwards and get to know God, and then look at the wooden board on which you are now seated. If you rule well, you will get everything you desire. Otherwise, you will fall so low and be so barren of everything that you shall not even be in position to keep the board on which you are now sitting.' (Bodin 2002, 36)

In other words, in the Tatars' case, the king's appointers were reminding the king of the dependence of his authority on his adher-

ence to moral standards. The king's legitimacy is constrained by his good-, or evil-producing, rule. The king's violation of moral standards would entail his fall, and, as marked by the wooden board that probably symbolizes the possibility of the total impoverishment and reversal of fortune, it is a fall to such a low level of existence that an average king's subject cannot experience it at all.

Today's status of the Bonn-powered High Representative to BiH should be compared with the status of the Tatar king who has, due to the violation of moral standards as outlined by the GFAP, fallen lower than the ritual wooden board. However, the loss of status has not yet been translated into concrete action, and is not yet conveyed to the 'king' himself. The consensus has unraveled, but the realization that it has indeed unraveled has not yet assumed the form of a serious and irresistible demand that the king be dethroned. What are likely developments in the near future?

6.4 The future?

Viewing the relations from the perspective of the issue of a Bonn-powered HR, further developments may take three directions: a) The status quo may be retained for an indefinite period of time. This means that the HR continues exercising authority under the Bonn mandate, which allows him to interfere arbitrarily with the legal-political landscape of BiH, despite the unraveling of the consensus that previously supported his mandate. For the reasons explained in Section 6.2, this direction is undesirable from the perspective of development of BiH as a pluralist and multiethnic democracy. For the reasons explained in Section 6.3, it is undesirable from the perspective of global politics as well. It is clear now that further interventions by the HR, especially in the domain that overlaps with Republika Srpska's interests, are likely to generate further discord and friction at the international level, especially between the Russian Federation and the US, but also between the

EU and the US.¹⁸ This is also bound to backfire on the already fragile relations within BiH itself. In this sense, the recent establishment of the connection between the problem of Ukraine and the problem of BiH, as voiced in the press by some former High Representatives, is especially disconcerting. It unashamedly aims at the resurrection of the Cold War atmosphere and misrepresents the Russian Federation as a cause of global troubles.

b) The simplest solution would be for the HR himself to hand back his mandate just as, prior to the Bonn conference, he assumed the mandate on his own. At some future conference, the PIC should welcome such a development. This is the direction that I find most reasonable and potentially most beneficial for BiH. I should also emphasize that such a development does not exclude the possibility that the HR continues with his engagement in BiH in his original, narrow, pre-Bonn mandate and role, as a key assistant to the peace process, or as its chief facilitator or coordinator of the international agencies. However, some complications may take place even as a part of this optimistic scenario. For instance, who should formulate the decision by the HR on the termination of his mandate, and how? This is an open and difficult question. Furthermore, based on the decision concerning the termination of the mandate, one could rightfully pose the question of how it is possible that the same peace agreement seemingly justified both the narrow and the broad mandate of the HR.

However, regardless of the questions that focus on more or less consequential but technical issues, one effect of the departure of the Bonn-powered HR may really be troubling in a practical sense:

18 For example, this is part of the German Federal Government reply (Deutscher Bundestag 2017, 4) to a parliamentary question prompted by the crisis in Bosnia over the issue of 9 January as the 'Republika Srpska National Holiday': 'There are fundamental differences in approach among the members of the Peace Implementation Council in relation to the issue of the use of so-called Bonn powers; this is why the High Representative would not enjoy the necessary support, were he to decide to make use of such powers.... It is the view of the German Federal Government that the processing of this case by the Bosnian-Herzegovinian judiciary has priority over the involvement of the international community' (translation from the German original is mine).

following his departure, the internal conflict may become more severe and lead to further divides and destabilization at the international level. Such a worsening of the conflict in the post-'Bonn-powered HR' era would be due to two crucial reasons: first, at least one of the BiH parties is likely to ask for, or initiate or press for, a revision of all the key decisions by High Representatives that expanded the central powers of BiH; second, it is clear that, from the beginning of the Bonn mandate till today, the relations between domestic actors have not improved, but remained discordant, perhaps have even worsened. The time that could have been spent on reconciliation and recovery of trust, and most importantly, on the development of the democratic culture of dialogue between the local parties, was instead wasted on the HR's interventions as well as on internal clashes, protests and slow-downs surrounding such interventions. In other words, it is quite possible that, following the return of the HR to the pre-Bonn period, the relations within BiH would deteriorate to such an extent that the parties could come close to the brink of war. I will not discuss any more the problem of a wise preventive action vis-à-vis such a possibility; I will only express my opinion that the concerned members of the international community have a substantial capability to provide for a preventive mechanism and block the eruption of armed violence.

c) It is possible that further developments will not end with the rapid departure of the Bonn-powered HR, following which a further evolution of relations would be left entirely to the domestic parties. Perhaps one could opt for a conditional closure of the Office of the HR, a closure that will be conditioned by a successful international conference resulting in an agreement on the replacement of the Dayton Constitution with a different one. In other words, one could safely assume that, following all the interventions by HRs that inflated the GFAP and made it unsupportable by major local actors, it would be dangerous to leave the post-Dayton arrangements entirely in the hands of those actors. Then, perhaps, new principles for a more just constitutional blueprint for BiH will be agreed on the assumption

that BiH should be sustained by its own sources of legitimacy, not by international pressures or guarantees. Additionally, a sincere offer of EU membership could be added as a key 'carrot' to motivate the parties to reach the new consensus on the new principles. However, the devil is in the detail, and this direction is as risky as the others. Here I simply address, as a possibility, another strategy of formulating a global response to the problem of envisaging the future of BiH without a Bonn-powered HR.

In the given conditions, I do not think that I am able to offer a more exact prediction. Personally I would prefer option (b) to option (c), and (c) to (a). When I consider the historical facts, my prediction is likely to be gloomy and discouraging, but when I hold fast to the belief that a rational and peaceful control of international relations and global politics is probable, I tend to lean toward a more optimistic prognosis. For a while, perhaps we should just settle for the sketchy trio of expectations that leaves no room for major surprises.

'Junkyard Dogs,' 'Viennese Stable Tenders' and the 'Savior of Bosnian Muslims': American Peace/War-Making Politics in Bosnia, to Dayton and Beyond

In this chapter I propose an analysis of American foreign policy toward Bosnia-Herzegovina (BiH) through four narrative elements, or subnarratives, that one frequently finds in American foreign political discourse as produced by key policy implementers through a relatively extensive period of time. The first narrative element concerns BiH as seen through the prism of transatlantic relations, as a part of the triangle 'America-Europe-BiH.' The second one concerns the so-called 'Balkan character'; this element gives us a more precise image of American perceptions of BiH political actors taken independently. The third element, or subnarrative, concerns an imagined American role in the course of implementation of the Dayton peace accords; this subnarrative, coupled with the second one, tells us something important about the institution of the High Representative to BiH as well, and contains important implications as to the transatlantic relations, too. The fourth subnarrative concerns the 'Muslims' in BiH, or more specifically, the symbolism that the American foreign political discourse projects into the notion.

The proposed analysis entails two critical consequences: first, the aforementioned narrative elements are mutually irreconcilable; this means that, considered together, they make the American foreign political discourse about Bosnia inconsistent or contradictory, hence, also unsustainable or unworkable in the long run. Second, the American foreign political discourse views the peoples of BiH

(and also its citizens as individuals) merely as instruments. The meaning of the peoples and citizens is identified with some political goals that are either irrelevant to BiH considered separately and independently, or even detrimental to it. More importantly, within the confines of the discourse, the peoples or citizens are not presented as instruments of a concrete, clear or tangible goal, but exclusively as instruments of a symbolic narrative and/or symbolic reputation. They are imagined as something that enables the American foreign political narrator to tell a story of America itself. In other words, we, Croats, Serbs and Bosniaks, are presented as purely fictional characters of a narrative that brings an emotional benefit to America in the sense that the endorsement of the narrative makes the narrative teller feel good about him- or herself. However, we, the real peoples or citizens, cannot feel good within the confines of the narrative and, perhaps more importantly, cannot act meaningfully and with sufficient independence in a political sense. Therefore, should we decide to free ourselves from such a condition, the presented narrative needs to be recognized, taken seriously, and ultimately not allowed to determine the 'terms of the debate' concerning BiH.

7.1 America-Europe-BiH

It is of the highest importance and consequence to notice that Richard Holbrooke, chief architect of the Dayton peace accords, presents the key points of the accords, as well as of the history that preceded it, not primarily in terms of the interest of the local parties, or of a common 'Southeastern European' good. He defines such points primarily in terms of the transatlantic relations, or more specifically, of the relationship between Europe and the United States of America. The key purpose and point is in the fact that America resumed leadership, and that it again proved itself to be a key European power. America resolved the European problem that the Euro-

peans were unable to resolve—this is the key part of American foreign political narrative to the extent it concerns the triangle ‘America-Europe-BiH.’ In April 1995 Holbrooke published a contribution to *Foreign Affairs* titled ‘America, a European Power,’ the introduction to which states the following: ‘Local conflicts, internal political and economic instability, and the return of historical grievances have now replaced Soviet expansionism as the greatest threat to peace in Europe. Western Europe and America must jointly ensure that tolerant democracies become rooted throughout all of Europe and that the seething, angry, unresolved legacies of the past are contained and solved’ (Holbrooke 1995).¹

Later, in a *New York Times* article in 2001, Holbrooke put it in more unequivocal terms: ‘In the end, the key question is whether the Balkans matter enough to justify such risks and costs. My answer is simple: They do matter that much, because European stability remains a basic American national security interest which did not end with the end of the cold war. When confronted by the criminal elements still threatening the Balkan region, which is located well within NATO’s area of responsibility, the only choice, in my view, is between early involvement at a low cost or heavier involvement later’ (Holbrooke 2001).

The Dayton negotiating process itself was conducted in the spirit of American supremacy over the European representatives. Determined to resolve the European problem that European diplomacy was unable to resolve, America restaged its leadership. (For instance, prior to the start of the Dayton negotiations, it was clearly conveyed to the German ambassador Ischinger that the American military force would be part of the BiH peace implementation/enforcement mission only if the peace agreement was negotiated and concluded on US territory [Haller 2006, 282].) General Wesley K. Clark described such American negotiating supremacy in the following terms:

1 Note here that Holbrooke interprets Bosnia’s (and generally former-Yugoslavia-related) troubles as a continuation of the Cold War, but with a replacement of the international, Soviet-led communist threat with a new arch-enemy.

Ambassador Holbrooke realized early that one key to the success of the negotiations would be to prevent Milošević and Izetbegović from playing off the Europeans against each other, or against us. It had been agreed that our American team would be the sole interlocutors with the parties, and that we would keep the Europeans informed through the mechanism of the Contact Group and direct consultations. This was a hard tactic for the experienced, proud Europeans to accept. After several years of leading the efforts to find a solution, they were now in a supporting role. (Clark 2001, 59)

What kind of figure does one deal with here? What does the narrative state? Briefly, the narrative involves three figures, three fictional heroes: America, Europe, and the warring/conflicted parties. The relations between the figures are complex, but, within this foreign political narrative, they boil down to three key aspects: First, America plays a superior role—it resolves the problem. Second, Europe and the conflicted parties are a part of the problem in the sense that they are either unable to solve it or are making it. Also, the problem is characterized persistently as ‘European.’ Third, by having demonstrated that it was able to resolve the problem, America presents itself as a key European power. It ‘proves’ to be a factor that cannot be removed from the European security space.

The narrative reads as a fairy-tale since it is not calibrated to the historical facts. However, it is not something that Holbrooke and Clark tell just like that. Americans have an inclination to present exactly such a kind of narrative. For instance, throughout the process of implementing of the Dayton framework, the American representatives repeat the key components of the narrative. Thus Carl Bildt complained that the Americans have not supported him in his role of the High Representative to BiH (Bildt 1998, 130–132). Holbrooke responds to Bildt’s complaints by stating that some ‘European states’ reined Bildt in (Holbrooke 1999b, 362). In an interview with the local press, Holbrooke later accused again some European states of being respon-

sible for an insufficiently aggressive implementation of the Dayton peace framework, and for having failed to support more resolutely the High Representative (Holbrooke 2000). Hence, the implementation of the Dayton peace framework is interpreted as a conflict between some insufficiently active or hesitant Europeans, on the one hand, and determined and rescuing Americans on the other. Bosnia thus remains a fictional venue in which America, within the first narrative element, continuously demonstrates its own superiority vis-à-vis European states, representatives, mediators, or negotiators. It remains a stage at which a script unfolds in which Americans compete with the Europeans, and in which the former demonstrate, primarily to themselves, their own superiority, while often marking both Europeans and the local parties as parts of the same problem.

Former UK ambassador to BiH, Charles Crawford, offers a fitting illustration from the period of his own diplomatic service:

[M]any British and European attempts to press for more subtle, pluralist outcomes were rudely brushed aside: In 1995 Pauline Neville-Jones and I sat in the US Ambassador's Residence after dinner in Moscow after the final Contact Group meeting before Dayton, talking about how best to build Bosnia after the war and in particular how to foster some sort of shared national identity. Pauline produced an English pound coin, to show that money could be used for different symbolic purposes, having a national motif on one side and different regional/ethnic symbols on the other. Holbrooke rudely brushed that idea aside as a typical example of convoluted, too clever European pointy-headed thinking: *'They're going to have normal money like the US dollar, and that's it!'* (Crawford 2012)

Such rhetorical positioning of Europe within the American foreign political discourse is a rule rather than exception. One should not find it surprising that such a type of rhetorical-narrative positioning is found exactly in the areas in which the American and Eu-

ropean representatives are forced to cooperate closely. For instance, the American negotiating strategy in the period leading up to NATO strikes against Serbia in 1999 was later described by an American insider as one that aimed successfully 'to get the war started with Europeans locked in' (Daalder and O'Hanlon 2000, 89). In fact, the strategy at the time related to the Europeans as potentially disruptive actors, as a 'brake' on the process of preparing for the NATO strikes to which American diplomacy *de facto* amounted during the Rambouillet talks (Ignatieff 2000, 56).

In 2003 Robert Kagan published *Of Paradise and Power*, a book in which he frames the post-Cold War relations between Europe and America as the relations between, on the one hand, a European post-modern paradise which is insensitive to the dangers of global politics, hence hesitant to use or rely on power, and, on the other, an America which is aware of the dangers and ready to build and apply force if and when necessary. Kagan places a heavy emphasis on America's assistance in the post-World War Two reconstruction of Europe, which he presents as an assistance by a 'power' to a 'paradise' that is now insufficiently thankful to its benefactor, which of course again invokes the figure of an immoral and fundamentally unjust European (Kagan 2003).

I am not in position to offer a detailed analysis of such an American narrative on Europe. However, it is important to emphasize here that this kind of narrative did not occur randomly. One should think, for instance, of a strong American propensity to draw a clear-cut distinction between the Old World and the New World, a world of the past and divisions, on one side, and a world of the future and removal of all divisions, on the other. In such couplets the first role is normally played by Europe, the Old Continent, from which the Americans emigrated from the seventeenth century onward. America, a promised land, is normally identified with the world in which divisions have been disappearing to give rise to a new, fundamentally just society—a 'City upon a Hill.' It is against the background of such distinctions that one should read Holbrooke's musings about

America as a European power that critically paved the way to the Dayton negotiations, once again helping Europe sort out its own problems and thus rejuvenating the Old Continent to an extent.

There is also no doubt that an apparent justification of such a narrative should be related to the role that World War Two plays in the rhetorical weaponry of American foreign policy. During the war, America, as the public narrative often reads, rescued Europe, while Europe for its part failed to recognize the danger presented by Adolf Hitler. To a large extent, the Europeans themselves are to blame because they opted for the flawed strategy of ‘appeasement.’ Now, America does not make such mistakes; it recognizes dictators in a timely fashion and opposes them energetically and mercilessly. This means that, whenever the American foreign political discourse qualifies a process as ‘appeasement,’ American policy makers are more likely than not to threaten with, and indeed use, force. When a political representative is compared implicitly to Hitler, this means that American foreign political actors are unwilling to consider negotiations with the representative as a viable option (see, for example, Record 2011; Arendt 1972, 40).

When Bill Clinton rejected the Vance–Owen peace plan for BiH, stating that it involved ‘appeasement’ (Glenny 1993, 229), this indicated two things: the insufficiently resolute, or even insufficiently moral, Europeans offered the plan to appease a dictator—in early 1993 the role is, within the American foreign political discourse, played by Milošević; second, Milošević is strictly comparable to Hitler and needs to be treated accordingly, a comparison that will again come to fore in 1999 with much more serious consequences.

As to BiH, the persistence of the American narrative about incapable Europeans who are unable to solve their own problems without American support was illustrated pertinently in a piece by Kati Marton (Marton 2013), Richard Holbrooke’s widow. Marton supported her call for America to resume its leading role in Bosnia by having heavily misrepresented the facts, but she faithfully adhered to the narrative that America cultivates about its relationship with Eu-

rope. In the piece she paints an image of European diplomats in dark colors, invoking the figure of Lord Owen, a frequently demonized mediator in the eye of Bosniaks and, as it were, a symbol of European duplicity, aristocracy, and appeasement. As Marton explicitly put it, Owen's only achievement was to have warned the Sarajevans 'not to dream of Europe's coming to their rescue.' She even goes as far as comparing a renewed European effort in BiH with 'returning a child to abusive parents.' Again, Europe is rhetorically framed as a problem, which is why America will need to intervene again.²

Marton criticizes another European, High Representative Inzko, as well, portraying him as a lazy official who, as she 'heard,' spends his time 'outside Vienna tending his stables.' The first version of her article also contains a gross factual error that strongly indicates that her narrative is part of a prefabricated imagery, not an outcome of an empirical, fact-based research: namely, she presents Inzko—who, being approved by the UN Security Council, officially acts as a UN representative—as a representative of Europe. It is also interesting to note that she makes no mention of the fact that one of the worst High Representatives' decisions thus far was made by Inzko in 2011, but with a heavy support by the American diplomats. By having 'provisionally suspended' a decision by the BiH Election Commission, Inzko legitimized the unconstitutionally formed Federation 'Platform' government. In other words, Inzko's 2011 decision involved exactly the kind of American interventionism that is preached by Kati Marton (see Chapter 6.2 above).

In order to understand fully this American foreign political narrative within the context of the problem of BiH, one needs to return to the period when the Cold War has just ended. It is when we consider it in light of the period that the said narrative discloses fully its own logic and political relevance. The period does not justify the narrative, but it makes the narrative easy to understand. In the immediate aftermath of the Cold War, in 1991, the security architecture built

2 See a similar narrative in Ashdown and Holbrooke (2008).

jointly by America and Western Europe seems to have either ceased making sense or lost a clear definition in a political sense. NATO was built to defend Europe against the Soviet Union and also to defend America through Europe. However, in 1991 the Soviet threat seems to have vanished, leaving NATO in the condition of a lack of political agenda or purpose. In such conditions, to some Europeans it seemed that the organization should adapt, or reconstruct itself, to reflect the new, obviously less threatening, global politics. Some Europeans have even tended to think that Europe itself should build a new and narrower security architecture geared toward the narrow European needs, a European structure as a more flexible and less overarching, and definitely less expensive, successor to NATO.

Americans took this to be a very unwelcome development. In actual fact, it hurt and angered them, which can only partly be explained by the American perceptions of both World War Two and the postwar developments in Europe. As the US State Secretary at the time, James Baker, later described the situation:

Some Europeans—certain that political and monetary union was coming and would create a European superpower—were headstrong about asserting a European defense identity in which America's role on the Continent was minimized. We had been fighting this for some time, and trying to get them to recognize that, even with a diminished Soviet threat, they still needed an engaged America. But our protestations were overlooked in an emotional rush for a unified Europe. The result was an undercurrent in Washington, often felt but seldom spoken, that it was time to make the Europeans step up to the plate and show that they could act as a unified power. Yugoslavia was as good a first test as any. (Quoted in Reljić 2005, 108–109)

In other words, Americans decided to retain the existing security structure, including their transatlantic relations, and as well recognized that some developments were taking place that enabled

them to redefine the post-Cold War situation as one in which the threats to Europe have not disappeared, but only assumed a different shape. This means that, to Americans, the problem of the post-Yugoslav disintegration involved an opportunity to compete with Europe and make it 'step up to the plate.' Given such conditions, it is quite normal that the American foreign policy makers should treat the problem as a demonstration of American strength as long as Europeans remain unable to solve it. If Europe proves unable to tackle and successfully resolve the issue, this means that America potentially remains a European power, or the leader, and it also means that NATO should remain in place and perhaps even be strengthened or expanded. In such a context, in 1992 BiH itself became a means of demonstration—to the European 'allies'—of the necessity of American leadership. It served suitably as a lesson to the Europeans that they could not do it alone, or that, without American leadership, Europe will fail to respond effectively to the post-Cold War threats.

It is only in this context that one can understand fully Izetbegović's role in early 1992, when he received a signal from US ambassador Zimmermann not to accept—or renege on, upon his acceptance—the Lisbon peace plan for BiH, the so-called Carrington–Cutileiro draft (Pehar 2011a, 168–184). Izetbegović in fact acted as a 'proxy' of the American foreign political narrative. He was exploited as an instrument by which American foreign politics created a problem for European diplomacy in order to demonstrate that Europe could not do it alone, and that American engagement/intervention, together with the existing security structures, remained a necessity. Additionally, there is no doubt that, to Izetbegović, some bilateral assurances were given, but not in the form of an official document (Pehar 2011a, 174–175). Interestingly, Izetbegović endorsed such a role and kept waiting for a more tangible form of help from the US over the next two and a half years.³ In the meantime, some 100,000

3 In other words, from 1992 till 1994, Izetbegović was dismissing the European peace proposals under the heavy influence of the US meddling (see also Greenberg and McGuinness 2000, 55).

human lives were sacrificed during a relatively brutal war of succession in BiH. They were sacrificed as a consequence of a narrative that too easily entrapped the minds of the key actors of BiH politics. One should add here as well that Haris Silajdžić, one of Izetbegović's key associates during the war, subscribed unequivocally to the American narrative about Europeans. To him, too, the Europeans are, first, 'tribal,' and second, a part of the problem, not the solution. Silajdžić thinks that Europe invented the practices of the nation-state making as well as of 'ethnic cleansing.' Hence, Europe, in Silajdžić's mind, was a natural ally of Karadžić and Milošević, the 'Balkan butchers' (Tuđman 2013, 42–43).

This is not an essay in history, but I need to add some parts or aspects of the war in BiH that can be elucidated only by considering the first element of American narrative that concerns the rhetorical construction of Europe. Namely, many historiographers, including the firsthand witnesses and the European mediators, claim that the Americans posed serious problems and obstacles to the European diplomatic initiatives. Taking a subversive action through Izetbegović's attitude to the Lisbon plan was just a first step. As Danielle Sremac emphasized, Izetbegović's rejection of a European plan, based on an American suggestion, 'set a pattern that continued throughout the war as European diplomatic initiatives would be foiled by Washington time and again' (Pehar 2011a, 171–172). Also, the American role in the undermining of the Vance–Owen peace plan in January 1993, which was followed by war between the Bosnian Croats and Bosniak-Muslims, is amply documented (Owen 1995; Gow 1997, 232–248). In other words, in order to be able to emphasize the incapacity of Europe to resolve its own security-related problems in the Balkans, America needed to aggravate, and even occasionally create and recreate, the problems.

Personally, I believe that the period of negotiating of the EU-sponsored Union of Three Republics Agreement, in July 1993, posed a major threat to the American foreign political narrative of 'Europe as an "entity" unable to resolve its own problems.' First, all the BiH

parties, including Izetbegović (quoted in Tuđman 2013, 53) and the Serbs, endorsed the fundamental constitutional structure. Obviously, this was a good first step toward the demonstration that the European mediators were capable of resolving the problem of the Balkans (see also Campbell 1998, 145–148). Second, and perhaps more importantly, Izetbegović now agreed to the idea of a Bosniak-Muslim republic covering some one-third of BiH territory (B92 2012). This means that Izetbegović now resumed the position he declined after the 1992 Lisbon agreement—he showed the will to sign up to a compromise, and second, he seemed to have given up the fundamentally flawed notion of the Bosnian Muslims as, in some sense, a fundamental people to the whole of BiH. In other words, it seemed that Izetbegović finally ceased trusting the promise he received from his American interlocutors in February and March 1992. By having done so, however, from the perspective of the American foreign political influence on ‘the European problem of the Balkans,’ Izetbegović ceased to be controllable.

Additionally, it is important to keep in mind that, within the frame of the Union of Republics plan, the position of all the BiH parties was relativized in a political sense. The alliance of Croats and Bosniak-Muslims, on which the international legitimacy of BiH as an international actor depended, ceased to hold. However, in contrast, the BiH Serbs officially demonstrated that, to them, BiH was acceptable when dressed in a suitable constitutional form. The transformation of the two-party war into a tripartite one seemed to have sobered up all the parties—they changed from a stubborn advocate of a strict policy to a more pragmatic political agent who fought for sheer survival. After having experienced the fullest possible inconvenience of a Hobbesian war of all against all, the warring parties in BiH also started to demonstrate their inability to present a justification for the acts that formerly matched the dominant pattern of the international, especially American, understanding. To American amazement, in some parts of BiH, the Croats and the Serbs started acting as allies, whereas in some other parts, the

Serbs and Bosniak-Muslims started coordinating their actions against the Croats. Perhaps most importantly, the war ceased to make sense to the Croats or the Bosniak-Muslims as they both openly betrayed their former cause. Paradoxically however, this also brought them both closer to the Serb perspective on BiH.

Nothing of this could have been interpreted as being supportive of the American narrative of 'America as a force that could save Europe from a European problem.' The problem seemed to have assumed the shape of a problem that was automatically resolved through an increase in its complexity, and the Europeans simply took the opportunity. However, Izetbegović suddenly altered his position once again, and another European peace proposal was dead. The relations again took the shape that made them follow the pattern of the American foreign political narrative. The extension of war for two more years, from August 1993 till September 1995, was the price to be paid. The Union of Republics plan collapsed due to a trifle—the issue of a small part of BiH territory: the coastal town of Neum and some chunks of the Bosnian northwestern territory (Stojanović 1993). Izetbegović thought that a Bosniak-Muslim republic would not be viable if not given the two small appendices. With hindsight, the problem could have been resolved in many ways, but American representatives simply 'accepted Izetbegović's reasoning.' As Charles Redman, American special envoy at the time, commented on the negotiating fiasco: 'It's a tragedy that they could not come to a solution. They were very close to an agreement, but I accept Izetbegović's reasons' (Stojanović 1993). The key question here is as follows: If the parties were so close to an agreement, why did American diplomacy decide not to take the small step of inducing the parties to end the war? The answer to the question is very simple: It was not an agreement negotiated or mediated by American, but by European diplomacy.

As widely known, starting in January 1994, Americans took their own initiative toward resolving the BiH conflict. However, to couch the further dynamics in such terms is not entirely fair. In

fact, American diplomacy drew widely on all the experiences the European diplomats had gathered by then. Following the rejection of the Union of Republics plan, the ideas and policies of the BiH actors were fully known to all. This also included the fact that Izetbegović seemed to have been comfortable with the idea of a tripartite partition of BiH (see also Komšić 2006, 388). Additionally, by July 1994 the International Contact Group fixed the division of BiH territory at 51% to 49% (Campbell 1998, 153). One should also keep in mind that the later agreements, mediated by the US, borrowed extensively from the key parts of the previous draft agreements mediated by the European representatives. Fundamentally, there is no difference between the Vance–Owen peace plan and the Dayton Constitution of BiH—both agreements are reducible to a simple notion of the federal arrangement and the division of governmental powers between the central and the local/cantonal/ethnic institutions à la the Carrington–Cutileiro draft signed in February 1992, but undermined by Izetbegović’s withdrawal of his signature. Perhaps more importantly, both agreements included the strong presence of international elements in the BiH bodies that are of major importance to the functioning of the state (see, for example, Pehar 2012b, 6; Campbell 1998, 139).

The year of the ‘grand finale’ was 1995. In August Holbrooke already knew that Izetbegović would accept the two-entity structure for BiH. However, it is also clear that he must have known this much earlier, based on the European diplomatic initiatives. Holbrooke’s account of the period is couched deliberately in excessively dramatic terms. It also appears from his book of memoirs that he negotiated the most important, constitutional, part of the Dayton peace accords on his own, with Izetbegović’s decision given a prominent part and described by Holbrooke as ‘a victim’s privilege’ (Holbrooke 1999b, 96–97). In other words, Holbrooke explicitly stated that, as the Bosnian Muslims were the primary victim of the Bosnian War, it was fair for him to lay the key decision in the hands of Izetbegović himself. However, such a depiction is miles away from the truth.

First, prior to Izetbegović's decision, the two-entity structure was already agreed between Holbrooke and Milošević. Second, Holbrooke actually performed a trick when talking to Izetbegović since he confronted Izetbegović with the following choice: either a full partition/separation, leading to an independent Muslim statelet with a 'much smaller part of BiH territory,' or a two-entity structure according to the formula 'two strong entities—one loose central government' (Holbrooke 1999b, 96).

In fact, by presenting exactly such options to Izetbegović, Holbrooke with a single stroke turned Izetbegović (the problem), which by 1995 suited the Americans, into Izetbegović (the solution), which in 1995 again suited the Americans. He imposed on Izetbegović a choice that was, given the conditions, impossible—the latter could not have accepted full Muslim independence with a smaller part of BiH territory because, throughout the war, he had officially fought for a multiethnic, civil, and unitary structure. However, by having framed the choice in the way he did, Holbrooke also signaled to Izetbegović that the former was fully aware that, to Izetbegović, a Muslim independent state would be acceptable, perhaps even preferable, as well. Most importantly, Holbrooke also signaled to Izetbegović that, had the latter not given up the key war aim for which he officially fought—a fully sovereign and fully unified BiH in which decisions are made by a majority, and in which the Bosniak-Muslims enjoy the status of a fundamental people—the war would not have soon come to a negotiated end, and definitely not to an end in which America and Bosniak-Muslims remained allies.

Furthermore, during the Dayton negotiations, America threatened Izetbegović—if the war continued, and the Dayton process failed, all three parties would in the future be treated equally, and the Americans would relate to the war as if it was a civil one, that is, basically not their business at all (Holbrooke 1999b, 271). By issuing such a threat the Americans also conceded that, throughout the war, their sympathies and support went more in the direction of the Bosniak-Muslims than of the others. However, the time has now

come for the side to recognize their enemy and understand that, had they failed to endorse the arrangement in which all three sides/peoples are treated as equally important to BiH, America would give up on them.⁴ This, as demonstrated in Part I of the book, did not mean that the US intended to retain that kind of arrangement throughout the period of the arrangement's implementation. In fact, for some reasons that I will try to address and elucidate in the conclusion, soon after the war's official end the Dayton peace was transformed into the process of a continuation of the 'state of war' in Bosnia by the unsettling of the original Dayton compromise, as explained in Part I (esp. Chapter 1).

7.2 Self-destructive 'junkyard dogs' of the Balkans

The Western treasury of stereotypes often ascribes to the 'Balkan character' the properties of an irrational, backward, premodern, even inherently pathological nature (Todorova 1997). A typical 'Balkan human' is a combination of Count Dracula and a peasant who tends his sheep and plays a gusle, a bowed string instrument, nurturing an exotic kind of epic poetry that invokes his mythical and often violent past. One narrative element of American foreign policy draws on such an image of the Balkan character and mentality. As a witness to a quarrel between Izetbegović and Tuđman, at the time the armed forces controlled by the two men were not engaged in a mutually hostile combat activity, Holbrooke presents the situation in the following terms: 'An aspect of the Balkan character was

4 One untypical account of the outcome of the Dayton process, which is true, but only if one reverses the direction of the causal arrow the author deems fit, reads as follows: 'The biggest winners in the entire process were the Bosniacs, who managed to involve the world's only remaining superpower in their region in a political, economic and military sense. Izetbegović tried hard to expand US involvement in as much of the Bosniac-Croat Federation as possible, on all levels—from policing to military operations. His strategy was quite simple: the ineffectiveness of the Europeans in resolving the crisis meant that the best hope for peace and security for Bosniacs lay with the United States. In this respect, Dayton was a triumph for the victims of Serbian aggression' (Finlan 2004, 83–84).

revealed anew: once enraged, these leaders needed outside supervision to stop themselves from self-destruction' (Holbrooke 1999b, 165). Interestingly, Holbrooke does not see a debate about some moral-political-legal position, nor does he see an emotional, yet political dialogue, a common search for solutions. He simply projects his own stereotype or bias onto the situation. He reads into it two identical characters that exemplify a more general character, and at the same time he presents the latter as both a single blend and a self-destructive body. In this perspective, the differences in opinions, or the positions held by the leaders, do not matter intrinsically.

Importantly, in the 'Balkanism'-related parts of American foreign political discourse, a pathologically self-destructive lunatic resembles an animal in the sense that his, or her, primary attribute is in his, or her, inability to use language reasonably. 'Balkan human' is unable to participate in a reasoned dialogue, or to search for compromise, or to exchange arguments with his negotiating partners. Also, s/he cannot think through the consequences of his or her acting. Hence, s/he cannot foresee the consequences of his or her actions, and thus cannot plan his or her own political life in a sensible way. This implies that someone needs to do such things for him or her.

However, a Balkan human could still be of use: for instance, to contain or block another Balkan human if and when necessary. Overall, the Balkan type is a danger to a civilized human being, and therefore needs to be treated with caution and through the politics of tight control and supervision. This too explains why America needed to take the leading role in resolving a European problem.

A close and careful reading of Holbrooke, and of the historical commentary on Clinton's decision-making, reveals that every single BiH and post-Yugoslav leader was viewed through the prism of 'Balkanism' and the 'Balkan character.' For instance, Holbrooke decided not to negotiate with the Bosnian Serbs because he could not bear their frequent invocations of history, their 'historical bullshit' (Holbrooke 1999b, 148). Croats, together with the Serbs, fought and

broke a multiethnic community; hence, they too deserved the label of ‘premodern barbarian.’ To Izetbegović, too, was devoted a chapter of the American story on the Balkan mentality and character. Bosnian Muslims could easily be transformed into Islamic terrorists, and the danger of their forging of closer ties with Iran is frequently ‘sensed’ and emphasized in American foreign political discourse.⁵

It is also important to note that Holbrooke describes his own negotiating strategy in relation to the ‘Balkan character’ in the following terms: ‘The best way to confuse someone in the Balkans, we often said, was to accept his initial proposal without change, at which point he would change his own position!’ As to such negotiating strategy, Roger Cohen claims that Holbrooke was primarily thinking of Izetbegović’s erratic changes in position (Cohen 1998, 107–108). There is no doubt that Holbrooke believed that he had a formula for dealing with such self-destructive Balkan characters. Additionally, while drawing the portrait of Izetbegović as a political leader, Holbrooke stated that Izetbegović was a revolutionary, one who tends to dismantle the existing legal and political arrangements in order to try building something completely new in a void space. Within American political discourse, the paradigmatic examples of such a political type include the communist leaders among Soviets—such as Lenin or Stalin—and Chinese, e.g., Mao Zedong (Holbrooke 1999b, 97).

Such leaders do not hesitate to sacrifice the peoples they represent in order to complete a historical mission—Izetbegović’s ‘offer’ to a Bosniak-Muslim police chief at Srebrenica, Hakija Meholjić, to the effect that ‘Clinton promised a NATO intervention if “Chetnicks”

5 See Holbrooke (2005b), which refers to the ‘hills of central Bosnia, where a shadowy organization we now know as al Qaeda was putting down roots that were removed by NATO after Dayton.’ According to Dževad Galijašević’s firsthand, and politically very courageous, testimony, this is untrue in the sense that the foreign Islamic, and proterrorist, presence was kept intact by the US well into the post-Dayton period. Even today, many Bosniak-Muslim fighters are reported to have returned home from the Syrian war in which they served in the ISIL-Daesh forces. For Galijašević, see his 20 March 2015 interview with Veselin Gatalo (available online: <https://www.youtube.com/watch?v=PG8aVlr1KPA>); see also Theuretsbacher (2016).

slaughtered 5,000 Srebrenica men,⁶ is to a large extent in accordance with such American preconception of both a 'revolutionary leader' and the 'Balkan character.'

One of the essential implications of the American narrative imagery of the 'Balkan character' is in its capacity to level down all the parties to a conflict or a diplomatic process. For example, after having read Kaplan's book *Balkan Ghosts* in 1993, Bill Clinton softened his interventionist discourse that by then kept regularly inviting the international community to oppose the Bosnian 'genocide' by force, and was referring to Serbs as the only culprit or 'savage' in the Bosnian War (Kaufman 1999). Regardless of its historical merits or epistemological soundness, Kaplan's book made Clinton more cautious and also more flexible in the sense of the readiness to consider a broader set of diplomatic solutions to the conflict. However, apart from its ability to level down all the parties it qualifies as the embodiments of the 'Balkan character,' this narrative has two further implications that are worthy of a more detailed account.

First, the Balkan characters are deemed to be merely mechanical entities, some kind of blind forces that do not act upon reasonable considerations, in view of goals or rational purposes, but by following their own mysterious impulse. These forces are not endowed with a clear notion of the desirability of one's own self-preservation, or of pursuit of one's own reasoned interest. This means that the external, and more civilized, actors need to treat these forces in a more or less mechanical way. The former need to create conditions in which the blind forces will be capable of containing each other, a kind of 'balance of power' in which the Balkan characters are constrained by being given 'bludgeons' of a roughly equal weight. Of course, as Holbrooke emphasized, they will also need 'external supervision.'

6 See *Srebrenica: A Town Betrayed* (Norwegian: *Byen som kunne ofres*, Croatian: *Grad koji se mogao žrtvovati, Izdani grad*), a 2010 Norwegian documentary about the prelude of the Srebrenica massacre of 1995, written and directed by Ola Flyum and David Hebditch. Available online: <https://www.youtube.com/watch?v=MnALEecbZ-k>.

It is in light of this aspect of the 'Balkan character' narrative that one can easily account for the full meaning of a note that, during the Croatian Army action 'Storm,' Bob Frasure, a US diplomat killed in a 1995 car accident at Mountain Igman near Sarajevo, passed to Holbrooke. At the time of the action, the US State Department debated the question of whether Croatia should be officially condemned for, or accused of, ethnic cleansing. Frasure's suggestion was not to do so, and this was also the policy that Washington officially adopted in the end. However, the note that Holbrooke quotes in full tells us something important about American perceptions: '[To] Dick [Holbrooke]: We "hired" these guys to be our junkyard dogs because we were desperate. We need to try to "control" them. But this is no time to get squeamish about things. This is the first time the Serb wave has been reversed. That is essential for us to get stability, so we can get out' (Holbrooke 1999b, 73).

Frasure here uses a number of metaphors that are perfectly suitable to convey the meaning of the 'Balkan character' as seen through the lens of American foreign political narrative. The 'dogs' to which Frasure refers are the Balkan leaders. These dogs are dangerous and placed in a 'junkyard' which here means the postcommunist 'trash' caused by the disintegration of Yugoslavia. The dogs are owned by Americans, and act still in accordance with the American interests. Their job is to guard the junkyard as the American supervision requires. Now, one dog has attacked another, exactly as dogs do, but this may bring some stability because it seems that one dog, 'Tuđman,' will manage to control another one, 'Milošević.'

A similar idea, though not couched in such picturesque terms, can be found in General Clark's book. In the course of the Dayton talks, Americans undertook the commitment to create a 'balance of military force' within BiH. This implies the need to equip and strengthen the 'BiH Federation (or, the Bosniak-Croat entity) Army' to make it a match for the Bosnian Serb Army. Clark considers the strategy as being of essential importance to the stability of the post-Dayton BiH. Again, we see the contours of the narrative of the 'Bal-

kan character’—one dog needs to be as strong as the other so that they can contain one another to avoid making a mess in the junkyard. Clark adds that one needs to be cautious about the Balkan leaders—one never knows for how long a peace frame will last for them. He put it as follows: ‘[I]n the event that there is a breakdown later on, your best guarantee against a resumption of hostilities would be a better balance of forces inside the country’ (General Clark to Anthony Lake, quoted in Clark 2001, 51).

In addition to the ‘Balkan characters’ as mechanical or blind forces, or dogs that need to be kept in check, the discourse of the self-destructive Balkan leaders implies another important consequence. It is capable of feeding and quasi-rationalizing a neocolonialist attitude. Since aggressive ‘dogs,’ i.e., self-destructive Balkan leaders, need external supervision, it goes without saying that the presence of an external force is required to do the job. In fact, the very Balkan characters call for the force by their self-destructive actions. They demand that an outside force rescue, or protect, them from themselves (Hudson 2003). The best way to conceptualize the characters is to present them as immature children, or persons suffering from a psychotic disorder, who are able to realize only the necessity of their own submission to an external guardian who will place some limits on their behavior and make decisions in their stead. However, it is immediately clear that a state or government, in which the relations are arranged so that the external supervisor must protect the Balkan self-destructive characters from themselves, cannot be deemed a democracy or a state in the real sense of the word.

Americans, as well as Europeans, claim that they are aware of this, but tend to add that this is but a temporary condition. However, here the key question involving the tricky mechanism of ‘double bind’ may be posed as follows: How could those self-destructive Balkan characters ever demonstrate that they have grown mature and ceased being self-destructive? Should they demonstrate such welcome development through a conflict with their external supervisor or through their obedience to the latter?

Namely, the conflict involves a risk that it may be too easily described as an expression of the lack of reason, hence as the ‘abnormal Balkan mentality,’ whereas the state of obedience indicates a slavish, or submissive, character rather than one fit for autonomous decision-making or democracy. If one subscribes to the initial thesis of the self-destructive Balkan characters that are unable to conduct their lives independently, it seems that one cannot offer a defensible and consistent response to the aforementioned dilemma.

7.3 ‘We are your project’ (Vice President Biden to Bosnian MPs, 19 May 2009)

Following the designation of local parties as self-destructive Balkan characters that must be placed under external supervision, it is fully natural that such supervision had been in fact materialized and embodied in a recognizable institution. In BiH such external supervision is embodied in the institution of the ‘High Representative.’ At first, the institution failed to impress the commentators or analysts who, reading the text of the Dayton peace treaty literally, viewed the role as one that would serve as a weak mediator, or coordinator, supposed not to lead, but only to assist the process of peace implementation (see, for instance, Malcolm 1996). However, counting the Dayton implementation period from the first postwar elections held in September 1996, such a ‘weak,’ or narrow, reading of the institution’s mandate prevailed for only just over a year.

One should, first and foremost, remind oneself of the fact that the parties signed the Dayton agreement under a specific interpretation: Holbrooke presented the agreement, in its constitutional aspects, as an agreement to form ‘one loose central government and two strong entities.’ The powers of the central government are clearly defined; however, the constitution, i.e., Annex 4 of the agreement, left some space to the entities to agree on a further transfer of their powers to the central level (Constitution of Bosnia and Herzegovi-

na 1995). Also, Article III 5b of the constitution stipulates that, as to the final agreement on the division of responsibilities, the entities will start negotiations to reach the agreement no later than six months after the entry of the Dayton Constitution into force. However, such negotiations never took place. One of the key questions to both BiH officials and the international community is 'Why?'

On the other hand, we know what indeed took place instead of the process of negotiating. In late 1997, the institution of the High Representative decided to assume the broad, so-called 'Bonn mandate,' powers, which transformed the institution into, literally, the 'dictator of BiH.' The HR assumed the power to dismiss elected BiH officials, to impose legislation, or to declare the legislation as adopted by the BiH legislative assemblies null and void. At the Bonn Conference, the Peace Implementation Council (PIC) welcomed such a decision by the HR. However, it is very easy to demonstrate that such usurpation of powers by the HR cannot be justified or substantiated in legal terms. In a legal sense, the HR's decision rests on a flawed interpretation of the Dayton agreement (Pehar 2012b; Baros 2010). I have more extensively discussed this issue in another essay (Pehar 2012b),⁷ which is why it will suffice here to mention a single basic fact: in the Dayton agreement the HR is explicitly designated as an ultimate interpreter of Annex 10, which enlists the body's key powers. Based on the Annex 10 designation, the HR has illegitimately transformed itself into the ultimate interpreter of all annexes, including Annex 4, i.e., the constitution. By such a move the HR placed itself above the signatory parties to the Dayton agreement, despite the fact that Annex 10 strongly indicates that this was a legal impossibility due to the fact that the signatory parties created the HR by calling the UN to assist their efforts during the process of implementation; hence, the HR is supposed only to assist the parties, not to replace their will with its own.

Additionally, following the *ultra vires* assumption of the 'Bonn mandate' powers by the HR, the claim that BiH is a democracy ceased to

7 See also Chapter 6 for more detail on this issue.

make sense. As the BiH Constitution foresees free elections, as it should be, and as, under the broad Bonn mandate, the HR can interfere with the election results *ad libitum*, the latter's presence makes of BiH an undemocratic state. Also, it is important to emphasize another point: it makes no sense to try educating some parties about democracy and freedom in the strong presence of the HR, as the latter requires a strict submission and obedience, and the parties' unconditional endorsement of all its decisions due to its imaginary role of a 'king.' This can hardly be taken as a path to the development of democratic mentality. In order to develop such a mentality or culture, the parties need to practice a critical, argumentative questioning, and a free and reasoned debate leading to independent decision-making, which cannot be reconciled with the appropriate context of the HR's *modus operandi*.

Now, since one deals here with the move that remains unjustifiable in reasonable, legal or constitutional terms, the move can best be viewed as motivated by some imaginary narrative or a foreign political discourse insensitive to both empirical facts and the basic insights of political and constitutional theory. Such motivation can be found in the 'need to supervise' the self-destructive Balkan characters. However, what kind of supervision is it? How is it possible to speak about 'supervision' when the foreign 'protector' actually makes decisions on behalf of the parties? Of course, it is a special kind of supervision—in a political sense, the foreign body replaces the parties supposed to be legitimized through the constitution and electoral process; it becomes them. Or, more precisely, the parties become mere extensions of the body.⁸ Let us look now into more specific aspects of the weird relationship.

8 For instance, this is how, at the end of his mandate, HR Petritsch presents his own achievement, which is based simply on the amendments he imposed on the entity constitutions: 'When I arrived here, this task [of putting Bosnia back on its feet] looked overwhelming. Formally and legally, Bosnia and Herzegovina was one state. In reality it was a patchwork of different ethnic communities and fiefdoms eyeing each other with suspicion and even outright hostility, and offering little to you, the citizens. Today, the situation looks dramatically different. Bosnia and Herzegovina has grown together and become a state—not the most efficient yet, but a state nonetheless. Its leaders—many are present here this evening—and you, citizens, have assumed responsibility to turn your home country into a real home' (Petritsch 2002).

Despite the hesitant Europeans who ‘stall’ the process (recall Kati Marton’s qualification of Inzko), America, through the institution of the BiH king/dictator, projects itself into a space in which the constitution is exploited only as a fig leaf, even as a bait, that enables, but does not justify, such a projection. Some European diplomats have realized early that the Dayton BiH Constitution is much closer to the American than to the European constitutions (Neville-Jones 1996/97). Also, in 1997 an American senator emphasized the following: ‘The United States is trying to recreate Bosnia in the American, multiethnic, multicultural image—an Americanization of the Balkans, if you will’ (Hutchison 1997). In 1996 I asked a State Department officer what, in her view, the word ‘entity’ (constitutionally, Bosnia is composed of two ‘entities’) means; she answered that, to her, it means ‘a state,’ but one in the American system, a member state of the American federation.⁹ However, Vice President Biden, in his address to the BiH parliamentarians in May 2009, expressed the idea of the ‘Americanization of Bosnia’ in the most vocal and unmistakable terms.

He described the whole process of the Dayton implementation in a quasi-religious vocabulary, as an ascent from darkness to light, and then added something that utterly confused a local interpreter who mistranslated his words; he said, clearly and loudly, ‘We are your project.’ In other words, a new Balkan-based America is a real project of the BiH politicians; their implementation of Dayton, as a reconstruction of their own common state, amounts in fact to a reproduction of America in BiH; or the creation of a BiH after the paradigm of America. This means that the local BiH politicians are expected to follow the pattern that is already there—it is the standard/ideal of the American federation as a cradle of the free world, a multiethnic state free from discrimination, a country in which the upholding of the individual rights gives everyone the opportunity to live the ‘American dream’ to the full.

9 For many similar, pro-American interpretations within ‘the international community’ employed in BiH, see Haller (2006).

Since Americans know best what America really is, it is quite natural that they create, or constitute, BiH in the way that reproduces American politics and society through the state frame. However, it is interesting to note that Biden added an important thought to his words on America as the ‘Bosnians’ project.’ He added that today’s majority (in BiH) may tomorrow become a minority; such is the American experience, too, he emphasized. In other words, Biden implied that the Balkan ideas about the ethnic groups and collective identities are nonsense. The BiH politicians should not bother about such ‘backward’ ideas—all they need to do is embrace the American experience and leadership. In other words, through such an addition Biden directly opposed the Dayton Constitution of BiH and stated that the constitutional constraints as outlined in Annex 4 of the Dayton Agreement are neither his, nor America’s, concern. This means that, to Biden, the ‘BiH constituent peoples’ is a meaningless category—perennially fluctuating minorities and majorities are all that matters, which means that, actually, no collective right matters at all.

Such an American narrative on BiH as a symbolic projection of America helps us immensely in understanding the key decisions of the key High Representatives in the course of the implementation of the Dayton peace framework. Some of it could have been sufficiently discerned through a focus on the comment on the Dayton Constitution by James O’Brien, the key legal adviser on Holbrooke’s team. Namely, O’Brien welcomed the fact that the Dayton Constitution contained fluid, vague, and general language that was sufficiently interpretable, which later enabled a flexible application of the agreement in practice (see O’Brien 2010, 348).

He also emphasized that the constitution contained both ‘forward-looking’ and ‘backward-looking’ provisions so that a true interpretation of Dayton, according to O’Brien, should amount simply to the deletion of the ‘backward-looking’ provisions in order to promote the ‘forward-looking’ ones (see quotes in Kostić 2011, 109–112). One should immediately understand that this has nothing to do

with the proper method of legal interpretation—it is O'Brien's highly idiosyncratic, and flawed, approach to the process of legal interpretation. By following O'Brien's recipe, one would never arrive at a defensible and reasonable interpretive outcome. However, O'Brien draws the aforementioned distinction for a political purpose—to open the door to America's arbitrary and unjustified quasi-interpretation. It goes without saying that O'Brien assumes that America, the founding mother of Dayton, is the only one which can tell the difference between the 'backward-looking' and the 'forward-looking' provisions of the Dayton Constitution.

The story about the two multiethnic entities, as well as a wide expansion of the powers of the BiH central authorities (keep in mind that the Dayton Constitution was adopted with the understanding that the BiH structure would be one of 'two strong entities and one loose central government'), including the BiH Armed Forces (not foreseen by Dayton Constitution), are parts of the same symbolic projection of America, through the decrees of the High Representatives, into the legal vacuum of BiH as a perverse kind of 'democracy' in which a democratically elected official can be removed without a proper legal explanation, by a nondemocratically imposed High Representative. HR Petritsch's amendments and OSCE Robert Barry's election rules as well are produced as a part of the very same process of symbolic projection. It is through such amendments and rules that one constituent people of BiH has in practice lost its constituent status, which to American foreign policy makers means only that a 'backward-looking provision' of Dayton was abrogated, with the alleged effect of increasing Bosnia's resemblance to America.¹⁰

10 Fully in accord with this, here is what Richard Holbrooke in November 2005 claimed about the fundamental categories, i.e., 'the ethnic difference,' of the Dayton Constitution: 'When we say "ethnic" ... it's just a fancy name for racism; racism which, by the way, is not based on any racial difference; there is no difference between Muslims, Croats, and Serbs. They went their different ways through the history of the last eight hundred years in the Balkans; but they all intermarried, they all came from the same place, and so on' (Holbrooke 2005a). In other words, Holbrooke here implies that, for BiH to achieve a real progress, the Dayton Constitution needs to be overcome and Bosnia needs to become increasingly like a mini-US. Also, Holbrooke clear-

Additionally, the July 2000 decision by a majority of the international judges at the BiH Constitutional Court to declare all BiH peoples constituent throughout BiH territory, U 5/98-III, was as irrational as it was unnecessary. More specifically, the decision draws on the premise that, by then, the BiH peoples were not constituent throughout the territory, which is a false assumption. The peoples were constituent throughout the territory simply due to the fact that the representatives of all the peoples were endowed with those powers that the constitution ascribed to the central level of the BiH government, which has the supreme authority over the entire territory of the country. The international community nearly unanimously hailed U 5/98-III as progressive and transformative for BiH politics, but one of the clearest, and most direct, implications of the BiH Constitutional Court ruling is as follows: one people is to a higher degree enabled to elect the representatives of another, which violates the basic principles of fairness and equality (for example, the Serb people of the RS entity can, and do, elect the representatives of the Bosniaks and Croats in RS; this does not speak about a multi-ethnic character of the entity, but about the injustice the entity is forced to commit by its adherence to U 5/98-III).¹¹

To this many additional examples could be added.¹² Importantly, however, High Representative's Inzko 2011 decision, to 'temporarily suspend' a decision by the BiH Election Commission, and thereby help the formation of the 'Platform' Federation government through supporting the unconstitutional motion by the Federation House of Peoples, should take nobody by surprise. It is a result of an American decision, of a peculiar frame of mind, and a psychological habit formed by the tacit acceptance of a narrative. In American eyes, BiH is a space

ly implies that a majority of BiH, even former Yugoslav, citizens are fundamentally wrong about their collective self-identification, or self-categorization.

¹¹ U 5/98-III is extensively explained and criticized in Chapter 3.

¹² See, among other things, WikiLeaks (2013), on a joint 2007 intention, on the part of the American ambassador to BiH and High Representative Schwarz-Schilling, to remove Dodik and de facto block application of a constitutionally valid agreement establishing the special parallel relations between RS and Serbia.

into which Americans project an image of America. Who can be more familiar with such an image than Americans themselves?

In one of the most advanced analyses of the High Representative's interventions from 2000 till 2002, Robert M. Hayden draws the following conclusion: 'In essence, the HR's structures for ensuring the equality of the several peoples of Bosnia reproduce the mechanisms that fostered political deadlock, collapse of the constitutional systems, and war in Yugoslavia (1989–1991) and then in Bosnia itself (1990–1992)' (Hayden 2005, 252). One should not find such a conclusion puzzling. American representatives perform a symbolic reproduction of 'America' in BiH not for the benefit of the BiH peoples and citizens, but for their own. In this sense, if over the last couple of years some form of international consensus had been formed to the effect that the Bonn powers of the High Representative were to be silently suspended, and that the role of an international coordinator, not a 'protector,' would be assumed by an EU Special Representative for BiH, this could involve an end to the symbolic projections of America into BiH through the venue of the High Representative. However, this could also mean that the US may try to find another 'Izetbegović' to point to, and aggravate, a 'European problem,' and thus show to Europe, in accordance with the first narrative, that America must remain a necessary part of a joint, transatlantic security structure.

7.4 '[T]he United States' foreign policy central objective in the mid-1990s was saving Bosnia's Muslims from ethnic cleansing and annihilation by the Serbians' (Zakaria 2010)

Taking the chance of annoying the reader, I start this section with a number of illustrations. In his memoirs Holbrooke presents the Muslim-Bosniak side unequivocally as a 'victim.' Despite his relatively frequent mention of the fact that, at Dayton but also earlier, both European and American mediators and negotiators found it extremely hard to deal with Izetbegović and his team, Holbrooke

finds an easy excuse and explains that, throughout the war, the Muslim-Bosniak side simply fought for survival, which is why, according to Holbrooke, they were unable to formulate a consistent negotiating position (Holbrooke 1999b, 97). This is historical misrepresentation. As a prelude to Dayton, at Geneva and New York, Izetbegović's representatives signed up to an outline of the Dayton peace agreement named the 'Basic Principles Agreement' (Basic Principles 1995). Hence, within the context of Dayton, the Bosniak negotiating 'misbehavior' should be described accurately as one's dishonest breaking of one's promise (see also Pehar 2011a, 137). Perhaps more significantly, in addition to his presentation of Bosniak-Muslims as a key victim of the war, Holbrooke, while referring to the Bosniak-Muslim representatives and Izetbegović's team, uses the term 'Bosnians,' though he was fully aware of the fact that they acted, and named themselves, as 'Bosniak-Muslims.'

In his later articles, too, Holbrooke presents the Bosniak-Muslim 'element' as being in no way related to the problems besetting the post-Dayton BiH. Problems are chiefly coming from the Serb and, to a lesser extent, the Croat side. Also, the whole process of the Dayton implementation is presented as a 'battle that continues,' one between good and evil—an analogy between the Nazi and the Serb side is drawn repeatedly. As to the Croats, they have destroyed the old bridge in Mostar and, according to Holbrooke, merit an emphatic condemnation because they desire to destroy the fragile 'Muslim-Croat' Federation; however, not a single problem comes from the Bosniak-Muslim side (Holbrooke 1999a, 2001).

Prior to the Dayton negotiations, and during the war, America had its 'symbolic' favorite within BiH—the Bosniak-Muslim side. For example, in early 1994 one diplomat presented the attitudes of the American negotiators as viewed by German ambassador Steiner in the following terms: '[Steiner] is very concerned about the lack of objectivity and understanding of the background and history on the part of the Americans. He spent a long time trying to convince Oxman [an American negotiator] that there were three peoples in Bosnia, not just the

Muslims and a collection of “minorities.” US still sees its role as protector of the Muslims, and that the others must just follow along. Steiner is worried that the European voice will just not be heard’ (quoted in Campbell 1998, 150). Hence, it is clear that, during the war, American representatives identify with, or favor, the Bosniak-Muslim side—without any critical examination and even despite the eye-strikingly clear evidence to the contrary, they seem to have ‘bought’ Izetbegović’s fairy-tale about BiH as a Muslim majority country.

Such American partiality, or bias, in favor of BiH Muslims (or the ‘figure’ of the ‘BiH Muslim’) can also be easily and frequently found in the US scholarly and analytical or journalist discourse. For example, in an article published in 2009, a late American historian Gale Stokes draws a rough and sketchy comparison between three Balkan leaders: Tuđman, Izetbegović, and Milošević (see Stokes 2010, 95). Of those three, in Stokes’ presentation Izetbegović is the only one who gets positive moral attributes—he is a ‘modern Muslim,’ not a fanatic or a nationalist. Hence, Stokes paints Izetbegović’s political neighborhood in dark colors, while Izetbegović himself is imagined and presented in the colors of progress and tolerance—a small David surrounded by two Goliaths. The empirical foundations of Stokes’ presentation are extremely weak, but he nonetheless senses an urge to impose a stereotype and single out the Muslim-Bosniak leader as, in a political sense, more progressive and likable than the other two.

In February 2011, Daniel Serwer, Holbrooke’s team member and one of the key American mediators for the BiH Federation, published a brief analysis with the title ‘The Siren Call of Partition Could Lead Only to Disaster for Bosnia’ (Serwer 2011). He very explicitly advocates the Bosniak-Muslim perspective on BiH. For instance, he claims that, in 1995, through the Dayton structure itself, Europe and the US ‘sided with Bosniaks.’ Second, as to the question of whether BiH should be partitioned or not, Serwer ‘borrows’ his entire argument against partition from the Bosniak-Muslim side. For example, in his opinion, soon, the Bosniak-Muslim population may reach the majority ceiling of 51%, and if the Bosniaks were allowed to form their

own Islamic statelet within BiH, this would be likely to radicalize the Bosniak-Muslim element, and turn it into an Iran-like source of terrorism and instability in Europe and the world. In other words, in support of the thesis of undesirability of the partition of BiH, Serwer presents a weird, or an entirely conditional and notional, argument in which the Bosniak-Muslims are presented as a potential menace if the US lets them govern their own state, exactly as it should be. They are also presented as a cooperative player if the US does not let them govern their own state, exactly as it should not be.

Additionally, he seems to look forward unashamedly to the time when Izetbegović's story about 'BiH as a country with a Muslim majority' will materialize. Viewed through the text of the BiH Constitution now in force, there is no place for the talk about majorities and minorities in BiH—today, as 60 years ago, BiH constitutionally thrives on the idea of the 'three equally constituent peoples.' However, Serwer seems not to have any problem with the use of openly anticonstitutional categories that echo Izetbegović's wartime ideology. Finally, Serwer's key advice to the Bosnian politician is as follows: 'The most important step Bosnians could take is to amend their Dayton-dictated constitution to permit legislation required for EU membership to pass without any of the "vital national interest" and "entity" vetoes that have plagued Sarajevo's EU aspirations for the past fifteen years.' By such advice he simply emulates the policy of the Bosniak-Muslim representatives committed to Izetbegović's wartime aims: a centralized country without its constituent peoples, or with nominally present, but essentially powerless federal units or entities, preferably defined in regional, geographic and nonethnic terms.

To return now to some familiar figures: in May 2009, before the BiH parliamentarians, US vice president Biden talked about the unimportance of majorities and minorities in BiH; again we witnessed some anticonstitutional categories irreconcilable with the Dayton constitutional structure, but easily reconcilable with Izetbegović's political agenda. The aforementioned Kati Marton in her 2013 article reproduces the image of Muslims as victims of the war, and pres-

ents the American role in the war in the following terms: '[W]e intervened in Bosnia to stop the massacre of Bosnian Muslims.'

Having all the aforementioned facts in mind, one should not be amazed by the often clearly recognizable connection between the Bosniak-Muslim element, on the one hand, and the High Representatives coupled with the American factor, on the other. Inzko, with a full American support, lent his support to Zlatko Lagumdžija, a Bosniak politician of a typically Bosniak-Muslim ideology adapted to the current BiH conditions, who often cites Alija Izetbegović without explicit acknowledgment. In 2011 Inzko also explained why 'we' should oppose the partition of BiH—to prevent the posthumous award to Milošević or a recognition of Karadžić; in other words, BiH should be preserved in exactly the same sense as the Bosniak-Muslim politicians claimed they fought against the aggressor suitably identified with the Serb side, which in fact was and remains one of the three constituent peoples of BiH.

U 5/98-III, passed by the court's majority composed of the international and Bosniak-Muslim judges, was in fact a decision to support the 1998 appeal against the BiH entities by Alija Izetbegović. Lord Ashdown, the fourth High Representative, publicly, and post facto, described his mandate as 'gradual dismantling of the Dayton structures to create the efficient state institutions' (Ashdown 2009), which is a policy any Bosniak-Muslim hard-liner would have gladly prescribed for him. In 2000, in the Office of the High Representative, I listened to a Russian diplomat complaining that High Representative Petritsch presented his program by quoting the official party guidelines of Haris Silajdžić, the then leader of the Party for Bosnia and Herzegovina and one of the most vocal proponents of a heavily centralized state of BiH, in clear contravention to the Dayton peace framework.¹³

13 Here I repeat some historical elements from Chapters 1-6, but in this chapter they are illuminated through the different aspects of the historical context. In Chapters 1-6 the elements were explicated through their ability to unsettle the peace framework, and thus to enable a continuation of the state of war; in this chapter they are explicated on the basis of the self-image America projects internationally. The outcome is the same in both perspectives.

How to explain such a bias of this part of the American foreign political narrative in favor of the Muslim element of BiH? Are Muslims really a better BiH people than the other two? Are their representatives somehow more humane, or perhaps endowed with a more evolved sense of justice, than the representatives of the other peoples? Or, is the Bosniak-Muslim lobby within America so strong that it can easily sell to Americans the story of the well-behaved, extremely civilized, European Muslims who reside in BiH? I mean all the aforementioned questions, of course, ironically. There is no special mechanism, or a tangible financial, economic, or political interest. The need that drives this part of the American narrative is purely discursive. In other words, for some reasons, America needs a story about BiH Muslims as victims rescued by America itself. America as well needs a story about BiH as a country in which Muslims are American allies, and in which America is recognized as a key benefactor to Muslims. Why does America have such a discursive need?

The answer to the question is very simple and straightforward. On 11 July 2010, Fareed Zakaria, who runs the program *GPS* on CNN, hosted Anjem Choudary, an Islamic cleric and UK citizen, who runs Islam4UK. During the talk Choudary openly advocated the terrorist attacks drawing on the familiar ideas—the Western world, America and UK in particular, have brought harm and injustice to the Muslim worldwide community: the Palestinians and occupied territory, the occupations of Iraq and of Afghanistan, the cooperation with the royal house of Saudi Arabia, which makes profits on the holy sites of Islam. To Choudary's critique Zakaria replied, '[T]he United States' foreign policy central objective in the mid-1990s was saving Bosnia's Muslims from ethnic cleansing and annihilation by the Serbians.' Choudary, a witty and rhetorically skillful speaker, responded to Zakaria in the following way: 'I'm afraid that you're living in the world of CNN.' Zakaria wholeheartedly accepted Choudary's comment, and the talk ended in a relaxed atmosphere (Zakaria 2010). Now, what does this exchange actually tell us about Bosnia?

Within American foreign political discourse, Bosnian Muslims occupy a prominent, especially privileged, space. Importantly, it is not a real, but a purely rhetorical space. Bosnian Muslims are important to American foreign political discourse because they can be used as a highly important quasi-argument. America has a rhetorical capacity to answer to those who claim that its foreign policy is inherently anti-Muslim or unjust to Muslims viewed as a single body of the believers in Islam: it can invoke the figure of 'Bosnian Muslims.' The facts that are irreconcilable with this rhetorical motion, and with the thesis that the US saved Bosnian Muslims, are conveniently ignored. The question of the responsibility for the outbreak of the war in BiH is ignored, too. The fact that the war ended with a classical compromise, in which all the parties, including Bosnian Serbs, Croats and Bosniak-Muslims, have both lost and gained something, is brushed aside. The only item that matters is a slight interpretive twist—to some extent, America helped the Bosnian Muslims, but it also aided, to some extent, all the others, including the Bosnian Croats and even the Serbs (keep in mind the recognition of the Republika Srpska entity).

Now, after the Dayton peace talks, Americans continue cultivating this 'topos' or rhetorical quasi-argument (a perspective which, despite the fact that it is insufficiently justified in rational terms, becomes a commonplace of politics, a political myth that goes without saying and is solidified by sheer repetition) in order to create a shield against those who accuse America of being anti-Muslim. The 'topos,' however, serves nobody else but Americans—it helps them preserve the sense of moral superiority over the rest of the world. 'Make no mistake—we have friends among Muslims as well; we are free from racial or religious prejudice; we are able to overcome the divisions of the past and embrace all the religions of the world; also, keep in mind that the Bosnian Muslims were not saved by the European, or even Islamic or Muslim states; they were saved by America.'¹⁴

14 For instance, Holbrooke (2005b) asserts that, 'the United States is the most respected nation in the Balkans.'

Most importantly, this kind of discourse is a myth, ideology, or an unfounded commonplace, but it still produces very real, tangible, and long-term political effects. I will mention only those that are critically important. American Dayton implementers view the Dayton implementation as an opportunity to emphasize a special relationship with the Bosnian Muslims. Second, since the discourse presents Bosnian Muslims as victims, they need to be compensated in some way in the course of the peace implementation. Third, America needs to show some willingness to reinterpret, or revise, those elements of the Dayton framework that the victim views as opposed to her, or his, interest. Fourth, the visibility of the ‘victim’ figure as a good guy, as one whose suffering was unjust and undeserved, needs to be emphasized time and again (see also Herman and Peterson 2010, esp. 46–48). This also means emphasizing especially the Muslim character of Bosnia-Herzegovina—and also the Muslims suffering for it (see Holbrooke 2005b).

Fifthly, this American discursive ‘topos’ involves the primacy of religious identification—Bosnian Muslims are important and valuable to the US due exactly to their Muslimhood, as the bearers of a general, religious, pan-Islamic identity, as those who are closer to the Palestinians, and Sunni Muslims generally, than to the Bosnian Catholic, or Orthodox, populations. This, however, to a large extent diminishes the importance of political identification and agenda, and also goes against, or makes it more difficult to recognize, the fact that modernization and pluralism in a political sense, on the one hand, and secularization, on the other, depend on, and reinforce, each other.¹⁵

Unfortunately, all such effects of the discourse on the ‘USA as a savior and caretaker of Bosnian Muslims’ are detrimental to the pro-

15 Closely related to this, some scholars have already identified and analyzed the role of theological vocabulary in the American foreign political discourse in the sense of the inclination to found the foreign policy on an ‘evangelism of fear,’ and on an imagined role of America as a God’s messenger on earth, or a redeemer; see, for instance, Galtung (1990) and Campbell (1992, esp. chap. 4).

cess of implementation of the Dayton framework, because the key premise of the peace framework is contained in the term ‘compromise’ (see Chapters 3.2 and 5.3, and the conclusion to this book), which entails the fundamental equality of all the parties, including their negotiating positions and interests. In other words, it is not easy to work as an American negotiator with the Bosniak-Muslim representatives under the conditions of the post-Dayton domination of the discourse of the ‘Bosnian Muslim victims’ and their ‘rescue by America.’ The talks between America and the Bosnian Muslims in such conditions frequently generate tensions and animosity. Simply, Americans are, like all normal human beings, often fed up with the actor who continually presses for new demands based on, and intended to compensate for, his status as a victim.

Obviously, such demands cannot figure as a reasonable argument or a plausible explanation why the implementation of the Dayton peace agreement ought to follow one interpretation rather than the other. At the US embassy in Sarajevo I often listened to the American exclamations that ‘we [Americans] are fed up with the victim talk,’ or even ‘that they [Bosnian Muslim representatives and leaders] brought it on themselves,’ in the sense that the responsibility for the war, and the consequent suffering, lies to a large extent also on the Bosnian Muslim policies. However, one needs to keep in mind that the American narrative on America as a savior of the Bosnian Muslims actually encourages, and even generates, such a nonrational argument in the form of a demand based on a vague status, which in the post-Dayton context necessarily acts as a destabilizing factor.

7.5 Conclusion

Due to a series of unfortunate events, in one period of its history BiH became a ‘global’ problem. By becoming such a problem, it also became a site into which the international factor, the US primarily, decided to project its own narratives concerning global is-

sues. That is how the BiH political actors turned into the instruments of a symbolic projection, that is, the characters of a prefabricated discourse the primary role of which is to assist the reputation of a narrator, that is, America. This aggravated the problem of BiH. Namely, the BiH actors have become less important exactly in the respect in which they should become more important—as equal and autonomous negotiating parties who, for their own good, need to agree freely on an (constitutional and political) arrangement they will deem viable and worthy of support, or to which they will commit, in a political and legal sense.

Furthermore, the elements of the American foreign political narrative of BiH are mutually irreconcilable or inconsistent. The narrative element that presents the self-destructive ‘Balkan character’ cannot be reconciled with the idea of BiH as a place in which America figures as a savior of the (good and innocent) Bosnian Muslims. The former element levels down all political actors, while the latter prioritizes one actor in relation to the others. The narrative on ‘the American resolving of a European problem’ cannot be reconciled with the frequent attempts to satisfy the appetite of the party that America considers as a victim in BiH; the attempts, and the appetite, are hardly reconcilable with the idea that a problem, especially one of the ‘European’ origins and character, has been solved.

Additionally, the idea that BiH could be transformed into a mini-America, through the interventions of High Representatives, is irreconcilable with the preamble of the Dayton Constitution that refers to the BiH constituent peoples. Coupled with the fourth narrative element, the idea also implies a demand that the ‘mini-America’ (i.e., BiH) remain recognizably Muslim, which cannot be at all reconciled with the actual image America has of itself. For such reasons, to which many others may be added, the American foreign political narrative on BiH is neither rational nor sustainable. The only question about the narrative that really matters is as follows: For how long will it continue to complicate, destabilize, and poison the relations within BiH?

Now, the question can be answered easily: The narrative will continue to poison the relations, and reproduce the state of war, in BiH, as depicted in Part I, as long as the US continues considering the 'Bosnian Muslim' as a globally outstanding figure, and as a regionally most deserving beneficiary of American help. Such political imagery, or rhetoric, together with the overall, confusion-creating inconsistency between the narrative elements of American foreign political discourse on Bosnia, will surely continue to unsettle the balance of a compromise achieved at Dayton by the three equally important, and constituent, BiH communities. Of course, for such a constellation to continue prevailing, the Bosniak-Muslims, too, will need to continue playing their own part—of a community heavily dependent on American support, and ranking their relations with America much higher in priority than the relations with the neighboring communities—which, contrary to all that the Bosniak-Muslim representatives and political elite claim about Bosnia, keeps destabilizing and disintegrating the state as it has been envisaged at least since Bosnia's separation from the Ottoman Empire in the late nineteenth and early twentieth century.

Misrepresentation of Bosnia-Herzegovina in the US Congress

In January 2013, Steven Woehrel, a European affairs specialist, presented a report on Bosnia-Herzegovina to the members and commissions of the US Congress. The report, titled 'Bosnia-Herzegovina: Current Issues and US Policy,' was proposed to the US Congress as the outcome of the work of the US Congressional Research Service (Woehrel 2013). The twelve-page document embodied a narrative frame of BiH that every American congressperson concerned with the state should have internalized by now. Hence, in this regard the key question may be put as follows: Upon having read, grasped, and taken as credible the aforementioned report, is an American congressperson likely to form an image of BiH that is clearer, more pertinent, and more informative than no image at all? Second: Is the image likely to be adequate and pertinent in two essential aspects: first, will the congressperson form or obtain a story that includes the key phenomena and relations? Second, will the congressperson form or obtain a sufficiently consistent and informative image on the foundation of which s/he may base a practical and viable US policy vis-à-vis BiH, i.e., a realistic and implementable foreign political initiative?

In this brief chapter I explain why the answer to both questions must be in the negative. Having read Woehrel's report, an average American congressperson is unlikely to form a clear, or consistent or adequate image of BiH; hence, the man or woman will be unable to draw on the report to formulate an implementable, or viable or consistent, foreign policy toward BiH. In other words, assuming that

Woehrel's report embodies an exhaustive cluster of data concerning BiH that the US Congress is in possession of, the institution is neither familiar with the most crucial facts, including, most importantly, the nature of today's political relations within BiH, nor is it endowed with a contradiction-free image on which it could base a viable and potentially successful foreign policy. Of course, one could only make a bold conjecture on the causes of such a state of affairs. *Prima facie* it is unclear how, and why, a superpower with a population of over 300 million, and with the best universities of the world, the largest number of Nobel Prize winners, an enviable tradition of political thought, and also the most advanced technology in the world, is not capable of producing for its legislators a truthful and plausible analysis of the political affairs as are practiced in a state with which American politicians dealt extensively and through a protracted period of time. This, of course, does not mean that one should not raise some interesting and inspiring questions, and point to some possibilities, that could serve to the future researchers as guidelines for an empirically sound, social or political epistemological research.¹

In the first section, my focus is on Woehrel's propositions on BiH in the sense of their veridical value—I simply demonstrate that his propositions are insufficiently fit to survive a scrutiny based on the historical and political facts, having in mind that the latter also include those of a legal and ethical character. In the second, my focus is on Woehrel's statements in the sense of the narrative coherence and relevance; in this regard I will be especially interested in Woehrel's 'blind spots,' that is, the facts and relations that have not, but should have, found their place in his narrative, which gives me sound evidence in support of the thesis that Woehrel is actively trying to conceal those facts and relations. In the third section, I make

1 Bearing in mind the conclusions of Chapter 7, the conclusion of this chapter should not surprise anyone. Of course, there remains the issue of political, or any, irrationality, which is generally difficult to explain. I agree with Davidson's theory of irrationality as incoherence under an objective standard, for which see Davidson (2004, esp. 189-198); see also Pehar (2004).

an attempt at explaining, or at least partially making sense of, the fact that the US Congress was presented with an analysis or research of such a low cognitive quality.

8.1 Veridical value

On page 1 of Woehrel's report one finds a clear historical fabrication, i.e., a distortion of historical facts:

Bosnian President Alija Izetbegović, a Bosniak, worried [in 1991 and early 1992] about the possible spread of the conflict to Bosnia and tried to find a compromise solution. However, these efforts were made very difficult by the Milosevic and Tudjman regimes, both of which had designs on Bosnian territory. In addition, Izetbegović's hand was forced by the European Community (EC) decision in December 1991 to grant diplomatic recognition to any of the former Yugoslav republics that requested it, provided that the republics held a referendum on independence and agreed to respect minority rights, the borders of neighboring republics, and other conditions. Izetbegović and other Bosniaks felt they could not remain in a Milosevic-dominated rump Yugoslavia and had to seek independence and EC recognition, even given the grave threat such a move posed to peace in the republic. Bosnian Serb leaders warned that international recognition of Bosnia-Herzegovina would lead to civil war.

Obviously, after you read the paragraph, your impression of the causes of the war in BiH will amount to the following narrative: Tuđman's and Milošević's regimes, and also partly the EC, but especially the leaders of the Bosnian Serbs, who responded by force and rebellion to the international recognition of BiH, are those responsible for the outbreak of the Bosnian War. Most importantly, the paragraph suggests that Izetbegović was a 'good guy' who even

sought some compromise solutions. However, the suggested image is fully inadequate. As to BiH, Izetbegović has not sought a compromise solution: his message, in 1991 and immediately prior to the 1992 referendum for independence, was clear—either full sovereignty for BiH or war.² In other words, in Woehrel's narrative all the key facts are simply omitted. Omitted is the fact that, in early 1992, BiH is a multiethnic state composed of the three equal and equally constituent peoples. Omitted is the fact that, prior to the outbreak of the war, Izetbegović signed on two occasions a compromise peace plan drafted not by him but by the EC/EU representatives, however, he swiftly revoked his signature on both occasions and thus clearly indicated his will to rely on an armed force as a means of resolving conflict. (The fact that, on one occasion at least, Izetbegović revoked his signature after meeting with US ambassador Zimmermann in Sarajevo, is left out as well.³) Perhaps most importantly, omitted is the fact that, through his many 1991 and 1992 public statements, Izetbegović expressed his view that BiH was, or should be deemed, a state in which the Bosniak-Muslim people's right as somehow foundational, and primarily state-making one, to BiH, and more important to the state than the rights of the other two peoples (and even, in Izetbegović's view, but contrary to empirical reality, a majority one in BiH), must be recognized and affirmed. Izetbegović's view was and remains irreconcilable with the explicit wording of the key constitutional provisions of BiH (reading that, contrary to Izetbegović's view, the three BiH peoples are equally foundational and coconstitutional) (Pehar 2011a, 143–151).

Now, Woehrel's fact-clouding claims extend to the postwar, post-Dayton, peace implementation period as well. For instance, on p. 3 is Woehrel's statement concerning the Office of the High Representative as follows: 'At a December 1997 PIC conference in Bonn, Germany, the international community granted the High Representa-

2 For a more detailed presentation, see Pehar (2011a).

3 See also De Krnjec-Miskovic (2003).

tive powers (known as the “Bonn powers”) to fire and take other actions against local leaders and parties as well as to impose legislation in order to implement the peace agreement and more generally bring unity and reform to Bosnia.’

In the sense of a legal qualification, this is an orthodox, but flawed view. As sufficiently widely known, at the Bonn conference the PIC simply ‘welcomed’ the decision by the High Representative to use his own powers broadly (as he deems fit, according to his own interpretation). In other words, the High Representative is a self-constituted institution that is created by its own interpretation of its own powers.⁴ In a legal sense, nobody can stand above, or ‘supersede,’ the institution, not even the PIC, if we endorse the interpretation of the High Representative’s powers that the very High Representative endorsed when he decided to start exercising his powers broadly (in mid-1997), and that the PIC also endorsed when they ‘welcomed’ the High Representative’s broad use of his own powers. Of course, the interpretation is, in a legal sense, indefensible, but it is exactly such an interpretation that both the High Representative and the PIC decided to try in practice.⁵ Most importantly, under such an interpretation, the High Representative becomes a dictatorial figure, and BiH can in no way be deemed a democracy as long as such a figure plays a prominent part in its politics. However, like many other ‘interventionists,’ Woehrel is prone to presenting a flawed view of the PIC as a source of the High Representative’s authority because, in such a view, the latter appears less authoritarian, or more democratic, than in the condition when we strictly adhere to the legal facts, including the fact that the PIC ‘welcomed’ the decision by the High Representative to exercise his broad, dictatorial mandate. Also, in the second section, I will demonstrate that Woehrel’s presentation, in the part that addresses ‘unity and reform in Bosnia,’ suffers from another cognitive flaw.

4 This is discussed in more detail in Chapter 6.

5 Ibid.

Woehrel's presentation is beset by another, comparatively worse fabrication of facts: this one concerns neither the pre- nor post-Dayton period taken longitudinally, but the current state of affairs; it aims to embody the key diagnosis of today's key problem in BiH, or the core and key cause of its current trouble. The diagnosis is presented in the first sentence of the Summary of Woehrel's report:

In recent years, many analysts have expressed concern that the international community's efforts over the past 17 years to stabilize Bosnia and Herzegovina are failing. Milorad Dodik, president of the Republika Srpska (RS), one of the two semi-autonomous 'entities' within Bosnia, has obstructed efforts to make Bosnia's central government more effective. He has repeatedly asserted the RS's right to secede from Bosnia, although he has so far refrained from trying to make this threat a reality. Some ethnic Croat leaders in Bosnia have called for more autonomy for Croats within Bosnia, perhaps threatening a further fragmentation of the country.

In other words, Woehrel here presents Dodik as a key problem. Dodik is one who, in Woehrel's view, aims to separate RS from Bosnia, which also explains Dodik's obstruction of the efforts to make Bosnia's central government more effective. An additional burden, or obstacle, comes from Croats who are simply inclined to contributing to the 'further disintegration' of BiH. Woehrel's presentation also clearly implies that no problems come from the circle of the Bosniak-Muslim politicians. The latter are constructive and eager to make the central government effective.

However, Woehrel misrepresents both Dodik's and Croat politics in BiH. First, as to the latter, Woehrel passes in silence over the fact that, on two occasions, in 2006 and 2010, the Bosniak-Muslim population vote elected the Croat member of BiH Presidency, one of the worst cases of open discrimination against BiH Croats, to which the international community, including both the Office of the High Rep-

representative and the US, responded by shrugging their shoulders. Woehrel did not devote a single word to the fact that the current election rules, combined with the current institutional structure of the BiH Federation, including both the legislative and the executive, are de facto imposed by the international community, and that such rules directly violate the status of BiH Croats as, according to the words of the Dayton BiH Constitution preamble, one of the three co-constituent peoples of BiH.⁶ Hence, when Croat representatives argue for the notion of a third entity within BiH, it is a rationally motivated move. It is a response to an unjust and imposed legal-political constellation that makes BiH nonviable, unfair, and nonmultiethnic in the form in which it currently exists, not generally or abstractly.⁷

The same applies to Woehrel's presentation of Dodik's quasi-obstruction: Dodik's threats are rationally motivated—it is a fact that BiH in today's legal-political form cannot survive, because in the long run it should not survive in the form of 'an international dictatorship.' Additionally, it goes without saying that, unless a consensus is formed between the three parties/peoples on the shape of a future BiH, both the secession of RS and the dissolution of BiH into three entities are equally legitimate options. Most importantly, Dodik never stated that RS should secede from BiH in the condition of adherence to the original, Dayton-based powers of RS and BiH, as those were specifically and precisely enumerated by the Dayton Annex 4. His reference to a referendum and secession should normally be coupled with the condition of a heavily centralized structure of BiH as imposed increasingly by the US and EU, in agreement with the Bosniak-Muslim political elite, with no foundation in the explic-

6 For my detailed argumentation, see Chapter 4 of this book; see also Vukoja (2014).

7 An even worse incident of discrimination was committed in 2011, when a number of Bosniak-Muslim parties, with a moderate support of small and nonrepresentative Croat parties, excluding HDZ and HDZ 1990, formed so-called 'Platforma government.' This was done through an open coup d'état, that is, in direct violation of the constitutional provisions. The High Representative, by a motion against the BiH Election Commission, lent a substantive support to the process in direct contravention to the democratic ethos and the rule of law in BiH.

it wording of the Dayton Peace Agreement. This should be placed in comparison to Holbrooke's statement, as reproduced in his memoirs, that the Dayton constitutional blueprint as originally drafted, and offered for signature, is a draw of 'the two strong entities and one loose central government' (Holbrooke 1999b, 96–97).

8.2 Coherence, relevance, and 'blind spots'

Woehrel's report is incoherent in many parts. Hence, having received and read this report, American congresspersons must have experienced a significant amount of confusion. It seems to me that the most troubling inconsistencies are those that concern the post-Dayton period of implementation of the Dayton peace framework. For instance, in one passage Woehrel accurately presents the nature of the Dayton constitutional structure for BiH: two strong entities, one loose central government, and special parallel relations between the entities and the neighboring states. However, he then continues by describing the international community interventions designed to strengthen the central powers of BiH as nearly a natural phenomenon, as something that is self-explanatory, even as something that ought to continue naturally and automatically into the future. As emphasized in Woehrel's narrative, the undesired obstruction comes from Dodik and, to a lesser degree, from Croat politicians. But, if the original constitutional structure is as described by Woehrel (as it indeed is), then Dodik's, or Croat, policy is not a problematic part of the post-Dayton BiH. What is problematic is the policy of the international community, which, as Woehrel's accurately points out, '[only] had the support of Bosniak politicians' (Woehrel 2013, 3).⁸

However, in comparison to this incoherence, a higher degree of importance should be attributed to some facts that Woehrel fails to

8 This is discussed in more detail in Chapter 1 above.

mention despite their widely known significance for the process of the Dayton implementation. For instance, when he briefly explains the role of the international community as a factor that ‘brings unity and reform to Bosnia,’ an inattentive reader could think that the role could be reduced to an attempt to strengthen, or widen, the central powers of BiH. However, as a matter of historical fact, such a role involved a much more serious attempt—to modify the institutional structure not only at the central, but also at the entity level. More importantly, it was an attempt to undermine, to the extent possible, the notion of the ‘constituent peoples’ as put in the preamble to the Dayton Constitution.

Those parts of recent BiH history are simply left unmentioned in Woehrel’s report. For instance, the report makes no reference to the BiH Constitutional Court ruling U 5/98-III, which was passed by a combined majority of foreign and Bosniak-Muslim judges on the bench. The ruling set the foundation for a subsequent redesign of the post-Dayton BiH, both at the state and the entity level, and was generally opposed to the notion of the ‘constituent peoples.’⁹ Also, perhaps predictably, Woehrel’s report makes no mention of the 2005/6 attempt by High Representative Ashdown to establish the BiH state police, contrary to the explicit wording of the relevant provisions of the Dayton Constitution.

Furthermore, when referring to US vice president Biden’s May 2009 visit to BiH, Woehrel fails to single out the key elements of the speech (Woehrel 2013, 9). I believe this omission was deliberate—those elements cannot be reconciled with the Dayton structure of BiH nor with the unproblematic elements of international consensus concerning the post-Dayton BiH. To recall the details: in his speech, Biden emphasized that ‘in BiH, as in the US, today’s majority may tomorrow become a minority,’ and ‘we [the US] are your project.’¹⁰ The former proposition cannot be reconciled with the

9 I make this point in more detail in Chapter 3 above.

10 Transcript of Biden’s speech as broadcast by BiH TV in May 2009 (recording in possession of the author).

status of Bosnia's constituent peoples, post- or pre-Dayton, and the latter proposition by Biden implies that the US is the only authority for the construction of a post-Dayton BiH because, as Biden clearly suggested, the US is engaged in creating BiH in its own likeness.¹¹

Woehrel suppresses some further relevant facts concerning BiH. For instance, explicitly referring to the so-called 'April 2006 package of constitutional amendments' offered by the international community to the Bosnian politicians, he simply states that the BiH leaders failed to adopt the package (Woehrel 2013, 3). However, Woehrel failed to mention the actors who were the main culprits of the negotiating fiasco—and the reason for this is probably the fact that the actors' affiliation cannot be made compatible with the key elements of his narrative. An inattentive reader will probably fill in the blank by assuming that Dodik, or somebody from RS, was the main culprit. The process, however, was actually undermined jointly by one Bosniak-Muslim (a very much pro-state and centralist-oriented) Stranka za Bosnu i Hercegovinu (Party for Bosnia and Herzegovina) and one smaller Croat party from the BiH Federation, HDZ 1990 (Hrvatska demokratska zajednica 1990, or Croat Democratic Union 1990).

The largest blind spot in Woehrel's presentation of the post-Dayton Bosnia is that he fails to consider the fact that the post-Dayton BiH is projected as a state formed by a federal constitutional arrangement, based on the concept of constituent peoples (i.e., pluralism of actors), and is only viable on the basis of a consensus. Since the state is based on a federalist concept, it goes without saying that its preservation and functioning requires a balance between an ethnic autonomy, and cooperation based on a parity presentation of constituent peoples, on the one hand, and an integrative, state-making function, on the other: a consociational arrangement. Hence, it also goes without saying that the entire constitutional arrangement

11 This, of course, relates to my more extensive analysis of American foreign policy vis-à-vis BiH, as presented in Chapter 7 above.

includes both centrifugal and centripetal institutional elements, which is why one should not decide to simply rank higher the centripetal tendency as somehow more valuable, or more important, to the smooth functioning of the post-Dayton BiH.

It is exactly this attitude of ‘the higher ranking of the centripetal tendency’ that Woehrel, through his research, attempts to smuggle to the American Congress. And it is exactly due to the attitude that Woehrel’s research fails to answer the key question that is otherwise strongly suggested, though not explicitly posed, by his own research: if a viable change to BiH could have been brought about only by an internal consensus (concerning, for instance, a fully revised post-Dayton Constitution to create fully functioning state institutions), and if such a change had not been brought about yet, and is probably unlikely to be brought about any time soon, how can one explain the motivation behind the international interventions at the time they were occurring, especially having in mind the fact that, as Woehrel too pointed out, the two of the three constituent peoples opposed them? How can one imagine that one can create a state on another person’s behalf, and then, seventeen years later, when one realized that this was an impossible task, cease at the extremely complicated and inefficient structure, demanding, or expecting, at least implicitly from the local actors to continue negotiating new structures as if nothing happened in the meantime?

Woehrel’s open suggestion that the finger-pointing at Milorad Dodik, as an alleged ‘key source of obstruction,’ should help one formulate an answer to the question is in direct contravention to all the results of Woehrel’s own research. Contrary to Woehrel, it is obvious that the key members of the Peace Implementation Council, that is, the international community, including primarily the US and the main EU members, have preserved, and even worsened, the instability of BiH, i.e., they helped the BiH parties to continue with the state of war by other means.¹²

12 This is explained in more detail in Chapters 1-6.

8.3 Political analysis, myths, and Gestalt effects

Judging from the report Woehrel offered, the answer to the question ‘What does the US Congress know about BiH?’ should read as follows: ‘Whatever it seems to “know,” it would be better if it knew nothing.’ Woehrel presented Congress with an inaccurate, incoherent, and very incomplete picture of BiH. It follows from this that, based on such a picture, it is impossible to formulate a coherent, purposeful, and potentially successful foreign political initiative.

Perhaps most importantly, Woehrel’s report fails to address the factor that every serious political analysis ought to address: political goals, ideas, and attitudes or projects, of the local political actors. The key political actors are presented by Woehrel as simple carriers of likes and dislikes, and nothing else (which is also in accordance with my Chapter 7.2 analysis). However, without a more detailed, and more realistic, assessment of the actors’ political ideas and arguments, it is impossible to explain the nature of the conflict within BiH, or the character of its internal political relations. Furthermore, it is impossible to explain the sense in which the actors’ ideas and arguments support, or undermine, the current post-Dayton Constitution of BiH.

Woehrel’s narrative of BiH resembles a vision of a giant who has been watching a fly without the help of a microscope. It seems that the giant simply put down in writing some impressions of a possible meaning and appearance of the fly, without actually looking into its internal structure. Also, in the writing, the fly is somewhat enlarged not by a microscopic vision, but by the fly’s positioning within a wider context formed by its neighborhood and international community, including primarily the EU and NATO (also in accordance with my Chapter 7.1 and 7.5 explanation). But, whatever metaphor for Woehrel’s narrative we choose, it is clear that the latter has the character not of a substantiated, evidence-based political analysis, but of a myth.

For quite some time now, the dominant American narrative of BiH has manifested the features of a myth, not of a fact-based or re-

alistic image. As substantiated in Chapter 7, it seems that the creators of the American narrative of BiH, starting with the beginning of the political crisis in the early 1990s, were not interested in BiH as such. Their attention to BiH extended only to the degree that enabled them (or gave them an excuse) to tell a positive story designed to recover or improve America's international reputation, primarily in a symbolic sense. In fact, Woehrel repeats the rhetorical strategy that we find in Holbrooke, and that can be illustrated especially by Holbrooke's political qualification of Izetbegović. In his memoirs, Holbrooke presented Izetbegović as a political actor without inherent political goals—as a victim and, importantly, as a Muslim who fought for sheer survival (see esp. Holbrooke 2005b). According to Holbrooke, this explains why the 'Bosniak-Muslim politicians' failed to formulate a coherent negotiating strategy during the Bosnian War, and especially why they failed to clearly formulate their political goals—the kind of BiH they aimed for in a political sense (Holbrooke 1999b, 97).

However, today we know that Holbrooke was wrong. He painted Izetbegović in such brighter colors probably due to his need to emphasize the positive nature of American connection with the Muslim element in BiH, and this in turn was probably due to the American need to improve its own public image abroad, not due to some inherent, or natural or pre-given, overlap between the American and the BiH Muslim policy in Bosnia. In other words, compared to Izetbegović, a real political actor, Holbrooke's presentation is arbitrary, unfounded, or fictional.¹³

Hence, one should not be surprised to find in Woehrel a considerable degree of mythmaking as a part of political analysis. We find old themes propagated and digested hundreds of times. In Woehrel's narrative, the 'Bosniak-Muslim political element' has no negative political attributes or properties; in contrast to the element, the

13 For a very important detail, see Chapter 5.2 or Pehar (2011a, 139). I analyze Holbrooke's presentation of Izetbegović in more detail in Pehar (2016a).

tendency to a destructive, or problematic, political conduct, is attributed steadily to either Serb or a Croat element, with Dodik serving as a convenient recent personification of the former, exactly as one would expect from reading Part I and the preceding chapters of this book. Having in mind that the revision of the Dayton Constitution by the international community very unequivocally diminished, or weakened, the constitutional position of both BiH Croats and Serbs, as two of the three officially constituent peoples, Woehrel's attribution means adding insult to injury.

Also, Woehrel makes an attempt to position his narrative within the frame of the story on 'the international, enlightenment- or modernity-spreading missionaries of democracy,' who are temporarily stalled, or prevented, by a barbaric element. Such a frame has no anchor in political reality, and the very basic, compromise-based constitutional structure of BiH poses an insurmountable obstacle to Woehrel's attempt. Now, since Woehrel's analytical frame is obviously not motivated by political reality, we have the right to raise the issue of the frame's true motivation. It is clear that the frame is a myth, not a well-argued or evidence-based description or diagnosis—but, what is the motivational structure behind the myth itself?

To put it briefly: due to the foundational narratives that are built into the collective image of its experience of becoming a nation, America views itself as an unjustly expelled outcast from the 'Old World' that is frequently identified with Europe.¹⁴ It is a victim of ancient prejudice and returns to the world not in the shape of an avenger, but of a redeemer. It recovers justice and defends the weak and the oppressed, radically altering the political reality in the pro-

14 Such a 'Europe' is simply an American rhetorical construction. As explained and demonstrated in Chapter 7, 'the BiH problem' is used by the American foreign political discourse as 'proof' that 'Europe' is weak and incapable, and therefore in need of continued American engagement in, or near, Europe, exactly as was the case during the Cold War. However, I also explain throughout this book that American foreign political discourse, and the American treatment of the Dayton peace framework for BiH, continuously unsettles the framework to keep alive 'the problem of BiH that is also European,' which is trivially true because, among many other factors, the High Representative is also a European, that is, a representative officially proposed by the EU.

cess. Hence, the American narrative typically revolves around very dramatic political relations marked by what is considered an unequivocally evil and unequivocally good element. In such a sense, the American projection of such a narrative into BiH is enabled probably by a Gestalt effect: on geographical presentations, BiH is normally depicted as an inverted triangle surrounded by two states that, through their BiH-based conationals, seem to penetrate the triangle creating an impression of both an external and internal threat. The relations within BiH may be perfect, but the Gestalt effect is likely to remain active. BiH appears as a fully surrounded, perfect geometrical shape threatened by disintegration or shrinking.

It is into such a space that America fictively projects its need to intervene, and defend, recover or strengthen the weak, surrounded and oppressed, nation from collective prejudice, or a backward idea of homogenous nation-states, or ethnic/collective rights.¹⁵ Now, keep in mind that the narrative is not rational—even when we imagine that BiH is a monoethnic state, populated by a single nation, the Gestalt effect is likely to persist. However, it seems that America actively cultivates the need for exactly such a kind of narrative, and that it acted and continues acting in BiH in light of such a narrative regardless of the actual outcome of the actions. It needs this vision of two Goliaths and a single David, the three figures involved in a never-ending conflict who define the role for America in this part of the world. It seems that this vision, not a reliable and empirically exhaustive study, is what lies at the foundation of Woehrel's narrative. Having in mind the conclusions drawn in the previous chapter, the figure of 'David' needs to be enriched and properly 'disfigured' to justify fully the nature of American interventions in Bosnia. 'David' needs to be understood to be only a potentially positive character, and it needs to be acknowledged that sometimes

15 This is in fact a paradoxical endeavor; in response, the American Bosnia-makers would probably assert that the nation concerned is in the state of transformation into a different, more superior nation highly similar to America. For an assessment similar to one I offer here, see Kostić (2013).

he can even be self-destructive, just like the two Goliaths. Sometimes he looks only like 'a promise of David' that the US will transform into reality in a not too distant future. I am aware that, while reading Woehrel, at least a few US congresspersons will recall the idea that contemporary states ought to be based on constitutions, not on the mythological apparitions from the Old Testament. However, the fact that Woehrel was able to present this kind of research as definitive to the US Congress strongly indicates that, in American foreign political discourse, 'Bosnia-Herzegovina' serves only propagandistic, self-aggrandizing and often moralizing, purposes. Of course, such purposes cannot but act adversely in the attempt to bring a real peace and reconciliation to the real Bosnian peoples.

Conclusion

The Dayton framework for peace in BiH was initialed in November 1995. More than twenty years later, according to the Fragile State Index, BiH cannot be classified as a stable or sustainable state: it is placed in 'a warning category.' According to the Index, the fragility of the state is reflected primarily in 'factionalization of elites' (8.7/10) and 'external intervention' (8.2/10). Nations in Transit assess BiH as 'transitional government or hybrid regime' that is much more undemocratic than democratic: its score is 4.5/7 (1—most democratic or minimally undemocratic, 7—maximally undemocratic). According to Freedom House, especially as of 2008 (when the score was 4.1), the Bosnian democracy is in a constant decline (Tepšić 2017, 23–24; Tepšić and Džuverović 2018).

Reliable statistical research of the Bosnian public opinion demonstrates that, after nearly twenty years of the peace framework implementation, the peace in the document was not translated into peace on the ground because, with regard to the key political and constitutional issues and attitudes, Bosnia-Herzegovina remains a deeply divided society. For instance, a majority of BiH Bosniak-Muslim population believe that BiH needs to be increasingly centralized, whereas a majority of Bosnian Serbs in Republika Srpska are of the opinion that the entity should secede from BiH and declare independence. Third, a majority of BiH Croats believe that it would be best if BiH was constitutionally transformed into a three-entity structure in accordance with the Bosnian ethnic identities.¹

1 See Jukic (2013), a report on the Ipsos/Kostić public opinion poll.

However, when hearing of the mention of a third entity, the key representatives of the Bosniak-Muslim political elite automatically respond by threatening, more or less explicitly, another war.² In other words, after 22 years of the implementation of the peace agreement, the condition both general and political of the country with which the treaty deals is of such a character that, according to a majority of reliable indicators (except the indicator of an armed and politically motivated violence), BiH is either a failed or dysfunctional state, or a state highly similar to the entities ridden with an armed political conflict. It is exactly such a condition that has encouraged some international scholars to publish the view that, from the viewpoint of the international consensus and EU policy, is not popular or ‘politically correct’—we should start considering seriously the option of ‘a peaceful divorce,’ i.e., the dissolution of BiH as an internationally recognized entity. In the words of Valerie Piergigli (2016, 129), a Siena professor of comparative public law: ‘If Bosnia-Herzegovina is not able to overcome the stalemate that Dayton has contributed to create, perhaps the dissolution of the state and the redefinition of boundaries might be the solution: drastic but useful to prevent new conflicts. In short, *a divorce by mutual consent*, unless a *marriage of convenience* is not evaluated as a better choice’ (see also Kecmanović 2017b and Kanin 2017).

Regardless of such policy-oriented assessments, here we deal indeed with a highly paradoxical and enigmatic condition calling for an empirically convincing and, in theory and practice, meaningful explanation. How is it possible that a peace treaty has been employed as a means of a continuation of political war for such a long time that the condition of BiH is effectively preserved at the level of ‘simmering,’ without reaching the threshold level of a politically motivated violence, and without leading directly to disappearance of every remaining inkling of Bosnia’s inner functionality or integration?

2 See Bakir Izetbegović on the Croatian TV show *Nedeljom u 2* on 4 February 2018 (available online: <https://www.youtube.com/watch?v=GoxY7BnP6iE>.)

In this book I did my best to give at least a part of an answer to the query. My answer is contained in all the chapters of the book, but the most important part is in Chapters 1, 6 and 7. I don't deem the explanation offered here especially original, in a general sense, but here such an explanatory frame, with a clear view of discourse and set on discourse-ethical and republican premises (see references in Chapter 1), is for the first time applied holistically to the process of implementation of a contemporary peace treaty. The frame is founded on the notion of 'dediscoursification' which, in the context that is here of interest to us, can be reduced to two submechanisms: first, deviation from the original meaning of the collective promise signed at Paris in December 1995; second, formulation and imposition of a deviating interpretation as official or dominating one. In other words, in relation to the Dayton peace treaty, the international supervision served a counterpurpose: instead of correcting the aberration and guarding the meaning that was originally accepted, the supervision approved the aberration and imposed it as a new norm under the clout of the 'power of ultimate interpretation.' The documents and the basic law had been read with the aim of unmaking the peace, as it is implied by the title of Part I of this book.

This also means that, according to its original intention, the Dayton treaty is a compromise, and that the implementation process was supposed to adhere to the spirit of compromise, which was not the case. Despite the fact that the concept of 'compromise' is far from being immediately obvious, as it does not refer to a tridimensional, tangible or middle-sized object, the best approach to it is to go back to its basic etymology: it is 'com-promise' (Latin *com-promissum*), or a promise jointly given by minimally two parties; hence, the notion is associated with the connotations of ambivalence and pluriformity. It is not a clean, uniformed political element, but a cluster of mutually heterogeneous values and guidelines that need to be kept in mind continuously and holistically, especially for the purpose of endowing the constitution with the reasonable interpretive content (Margalit 2009; Gutmann and Thompson 2013; Matson 1967).

As Unger (quoted in Benjamin 1992, 118) emphasized, ‘compromise’ is something that reflects the force of reality; hence it is intrinsically tied to the idea that, through a compromise, we find a peace with something that is real or given and immutable, or the ‘desire of the other’ in which, despite the fact one does not like it, one cannot trace the element of fundamental illegitimacy or irreconcilability with the human nature (see also Henda 2012, and Pehar 2002).³ That is why, to those who are prone to oversimplifying the social and political relations, ‘compromise’ has often been misapprehended and reduced erroneously to two aspects: ‘excessive complexity/confusion’ (in the cognitive sense) and ‘surrender or betrayal’ (in the social-emotive sense) (emphasized by George Santayana, as quoted in Gutmann and Thompson 2013, 193); hence, predictably, many commentators of the Dayton compromise, both within Bosnia and abroad, tend to characterize it exactly in such terms.

Furthermore, as especially emphasized in Chapter 3.2, the Dayton compromise has the role of a remedy, i.e., a reasonable response to a foundational issue, or worse, a disease of society. It is such an interpretation of the treaty that should have, but has not, been safeguarded throughout the process of implementing and interpreting of the Dayton peace agreement, and Annex 4 as the BiH Constitution in particular. In that same chapter I should have placed a greater emphasis on the key importance of two documents in which one can clearly realize that the Dayton treaty is a compromise—of course, the documents were later built into the Dayton treaty, but standing on their own they cast on the Dayton peace package a high degree of clarity: ‘Agreed Basic Principles’ and ‘Further Agreed Basic Principles’ (Basic Principles 1995) signed prior to the start of the Dayton negotiations, in September 1995 at Geneva and New York, at the level of foreign ministers of the Republic of Croatia, Bosnia-Herzegovina, and then Federal Republic of Yugoslavia (comprising in 1995 both Serbia and Montenegro).

3 Such a view overlaps considerably with the notion of compromise as ‘the balance of dissatisfaction,’ which is also reflected in the ‘envy-freeness’ theory of sustainable peace agreements as advocated in, for example, Brams and Togman (1998).

Now, how, and by what means, was the original compromise deformed, or undermined, through the process of imposed interpretation which gave it the shape of a noncompromise that at least two (of the three) original parties to the Dayton peace have not originally supported or legitimized? Speaking simply, the Bosniak-Muslim political elite and leaders decided to initiate the process of delegitimizing of the Dayton Constitution as originally conceived and intended, in which they received support from the ‘international community,’ but to a degree, not fully or to the bitter end.⁴

Throughout the process we deal, of course, with very specific actors, contexts, and events. In the book, Chapters 1 and 3, I explained exactly how Alija Izetbegović, supported by the US, the UK, France and Germany, approached the BiH Constitutional Court through the 1998 to 2000 period. At the court he was supported also by a majority of foreign judges (plus the Bosniak-Muslim ones). A similar fate occurred to the Bosnian election law for which another US im-

4 This is how recently Bakir Izetbegović, appearing on the Croatian TV talk show *Sundays at Two*, specifically accounted for the Dayton peace framework: ‘The Dayton framework was created by the aggression against Bosnia-Herzegovina.’ In other words, Izetbegović Jr. clearly suggests that, to him, the Dayton peace agreement is as disagreeable as ‘aggression’ against BiH. This further means that, in his view, the Dayton agreement should be opposed in the same fashion in which the Bosnian Army opposed ‘the aggression,’ or to use more neutral and realistic terminology, in which the former fought against the Bosnian Serb Army, which opposed the anticonstitutional war aims of Bakir’s father, Alija. Of course, 22 years after the start of the process of implementing a peace agreement that is said to have been quasi-implemented over the entire period, Izetbegović’s qualification of the agreement sounds very curious. However, here I need to add that the Bosniak-Muslim political elite have also supported the original Dayton treaty in its originally intended meaning; but, after the signing, the appetite of the elite grew insatiable. One witnessed a process that is not infrequent in politics—an effort by one party to maximize its own interests at the expense of others’ interests, and to replace a compromise, or an optimal solution, with a maximalist one. It is, hence, true that Alija Izetbegović issued many statements in support of the ‘original Dayton as a compromise,’ some of which I quote in Chapter 3.1. Those statements were later suppressed and conveniently forgotten, while the only ones that remain are quoted by the key Bosniak-Muslim ideologues (e.g., Edin Šarčević, whose theories I challenge in Pehar [2011b]) as alleged evidence supporting the thesis that Alija Izetbegović signed the Dayton agreement believing that the agreement was unjust, or that its only worth was in its capacity ‘to stop the war.’ Additionally, we should not forget an important fact: it was in 1991 that Alija Izetbegović openly voiced his view that the problems of BiH politics need to be resolved ‘as reasonable people do, through a compromise, and in a fashion that is equally acceptable by all the peoples’ representatives, including the Serbs and the Croats.’ As to the question of what induced Izetbegović to change his view, as he changed it after the start of the Dayton peace implementation, I suggest to the reader to consult Pehar (2011a).

plementer of the Dayton Agreement should be held responsible—Robert Barry who, as the Head of the OSCE Mission to BiH, effectively determined the legislation in that area (see also Lučić 2012). The BiH election law is the factor that gave rise to the phenomenon of ‘Komšić in the BiH Presidency’ (see Chapter 4.2), and that lies at the heart of the issue that the European Human Rights Court, in its *Sejdić and Finci* ruling, wrongly attributed to the BiH Constitution (again, explained in more detail in Chapter 4.2 of this book).

Of course, within this context, we need to bear in mind primarily the actions of High Representatives, including Wolfgang Petritsch (1999–2002) and Lord Paddy Ashdown (2002–2006), and to a degree, Valentin Inzko (2009–). The three High Representatives have followed the orders/guidelines exclusively of the strongest players, i.e., of the US and the UK, within the relevant period of time. Petritsch himself was in fact rewarded through the post (of the High Representative in Bosnia) for his role in the 1999 Rambouillet negotiations, while Inzko’s acting at the time of the forming of the BiH Federation government in 2011 can be explained only by the direct influence of the US.

Especially in Chapter 6, I offer an explanation of the fact that the High Representative in BiH has been a conflict-aggravating institution, hence, I also offer an account of the precise sense in which the international community in BiH is part of the problem, not a solution (see also Kecmanović 2012; 2016; 2017a, 179–181, 315–317). For instance, among many other issues, it is through his April 2002 amendments to the Federation Constitution that High Representative Petritsch transformed the Federation Croat people into a ‘constituent minority,’ acting thus contrary to the letter and spirit of the Dayton Constitution as well as of, as I explain in Chapter 2, the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina (DAIF). Ashdown described his role in BiH as one of ‘arm-twisting’ that went beyond the constitutional limits of the Dayton agreement in the attempt to create the BiH Armed Forces and dismantle the existing entity armed forces. Ashdown managed to cre-

ate such a force despite the fact that the Dayton Constitution did not foresee one at the central level of Bosnian government. However, we need to keep in mind that the Republika Srpska politicians also managed to oppose and defeat another Ashdown's attempt—to dismantle the entity police forces and create a unified Bosnian police after the model of the BiH Military Forces; again, his attempt was in direct violation of both the letter and the spirit of the Dayton compromise, i.e., the federalist design of the Bosnian Constitution.

Here I will add a few more details that pertain directly to Chapter 6, and that additionally support my thesis on the direct Bosniak-American collusion in the process of undermining of the original Dayton compromise as a process of revision that was taking place through a series of imposed interpretations, which predictably resulted in a continuation of war by other means.

At the end of October 2005, while he was packing his bags to leave Sarajevo, Ashdown gave an interview to the *Guardian's* Ed Vulliamy (Vulliamy 2005), which very reliably indicates that the institution of the Bosnian High Representative serves not the peace, but in fact requires, and regenerates, the condition of conflict, a state of political and verbal war, as part of his daily business; hence, that the primary role of Bosnian High Representatives, who are equipped fully with dictatorial powers, is to recreate and reinvigorate the political (and also legal, social, constitutional) conflict in BiH. First, Ashdown was very direct in emphasizing that his powers were dictatorial, but his primary emphasis was, as he claims, on his use of such powers to 'lay foundations to the Bosnian state' and prepare it for the process of EU accession.

In contrast, let us look at the way Ashdown described the structure within which he operated as a High Representative. At the end of his mandate, he does not hesitate to inform Vulliamy, and the Bosnian population at large, that 'Bosnia-Herzegovina is not ready yet for reconciliation.' In other words, he clearly suggests that his acting in Bosnia was more likely to deepen and aggravate the conflict than contribute to its resolution. How can one 'create a state' in a so-

ciety that one has depicted as ‘currently irreconcilable’? To me this admission sounds not as a recipe to the true peacemaking, but as a spark in a highly flammable environment simply because, when one applies a strong centripetal force by ‘laying foundation to the central state structures’—and, as Ashdown quite honestly and repeatedly pointed out, by going beyond the constitutional limits of the Dayton agreement (see especially Chapter 1.3 and Note 5 in the Introduction)—and does so in the condition of a very insufficiently reconciled, or deeply divided, society in which a consensus is extremely difficult to form, this will naturally give rise to a counteraction in the sense of the strengthening of both the centrifugal force and of dissatisfaction with, and the desire to overthrow completely, the Dayton peace framework among the Bosnian Serbs and Croats.

Second, one cannot fail to notice that Ashdown as well as Villiamy, in his comments, view the war in BiH, and the key elements of the postwar dynamics, in terms that are very biased in favor of the Bosniak-Muslim perspective. For instance, the attitude of the ‘international community’ toward the war in Bosnia is marked as ‘appeasement,’ hence, as toleration of a Nazi-like aggression that is tacitly identified with the ‘Serb side.’ In addition, Ashdown explicitly claims that the Bosnian Serbs are those who should be the first among the Bosnian communities to confess their war crimes in BiH. The Bosniak-Muslim population and policy, and also the Croat to some extent, are very awkwardly designated as more civilized and more pro-European.⁵

5 To my knowledge, Ashdown was the first international official who, probably unknowingly, quoted nearly verbatim Foucault’s inversion of Clausewitz, stating that ‘all politics in and about Bosnia is a continuation of war by other means’ (Ashdown 2004, quoted in Chandler 2006, 17). However, both Ashdown and Chandler clarified such evaluation by drawing on a premise through which the two directly sided with the Bosniak-Muslim political elite: the Dayton peace treaty is not convenient as a tool of true peacemaking because it served the purpose of, and was good only at, ‘stopping the war’—it is, as Ashdown and Chandler believe, impossible to create BiH as a state on the basis of the explicit wording of the agreement. This is why Ashdown considers the post-Dayton period as one of a political war that is waged in the post-Dayton ‘constitutional vacuum,’ and in which the arbitrary, textually unfounded, reading of the constitution by the great powers is fully acceptable (see again my quotes from Jim O’Brien in Chapter 1).

For instance, Vulliamy inaccurately, and with a bias, presents the following view of the Bosniak-Croat Federation contrasted with the Serbs: ‘Ashdown set out to create a unified state which could find its way into the European Union—something the Muslim-Croat Federation was desperate to do (poignantly, they included the EU’s starry flag in theirs), while the instinctively separatist Serbs—who doggedly identify with Serbia, not Bosnia—were ready to contest all efforts.’ One cannot fail to recognize clear anti-Serb stereotype in the paragraph addressing ‘instinctively separatist Serbs.’ Also, one should here emphasize that the paragraph ignores the fact that the Bosnian Serb identification is not primarily with Serbia, but Republika Srpska, one of the two equally legitimate entities of which Bosnia is today constitutionally composed. Vulliamy thus, contrary to the actual popular allegiances in BiH, implies and suggests that the Serb element is inherently destabilizing and destructive to BiH. Obviously, such a statement can hardly be reconciled with the alleged attempt by the international community to create in BiH the conditions favorable to the process of reconciliation or to contribute to such conditions with a sincere peacemaking message and policy.

Also, I need to emphasize here that, in the article, Ashdown confessed that he nearly provoked international incidents through his attitude to an (unnamed) major power (probably the Russian Federation). He states that, ‘Once, I even had an embassy threaten to cut off diplomatic relations with me.’ This, of course, indicates clearly that the Bosnian High Representatives have the capacity not only to preserve the state of conflict within BiH, but also to give it a meaning internationally and thus turn it into a focal point of even major international confrontation. My preceding point should help us to understand more clearly all the implications of the article that Ashdown, together with Holbrooke, published in the 22 October 2008 issue of *The Guardian* (Ashdown and Holbrooke 2008).

The article is full of the standard Western stereotypes about Bosnia, and it shows clearly that the international intervention/supervision of Bosnia served a single purpose: to retain the Bosnian po-

litical conditions exactly at the point at which it found them immediately after the end of the Bosnian armed hostilities. Significantly, the title of the article designates the country as ‘a powder keg.’ Again, but now in twelfth year since the start of the process of direct international supervision, BiH finds itself facing a collapse (!); or, ‘the peace agreement is [yet again] facing a major crisis.’ In addition to the local nationalisms, Ashdown and Holbrooke accuse a sleepy Europe, and a weak High Representative, of this unfortunate development. However, this time the two see in Russia, which supports Dodik and Serbs, a key culprit, which obviously means that, now, the Bosnian troubles are viewed as implanted from abroad by a clearly demarcated foreign power, and this is why this kind of accusation has the potential to contribute to the emergence of severe international crises. Unless the US, through NATO, renewed both diplomatic and military efforts, we will be witnessing a reenactment of the 1992 developments—so the two leading international experts for Bosnia claim.

However, even more importantly, the two also address the issue of real drivers of progress in Bosnia, and name only two factors as being of such a standing: the international military force (EUFOR)⁶ and the Office of the High Representative. Ashdown and Holbrooke state that the EU should strengthen those two factors. However, when one reads this conclusion by the two literally, it is reasonable to conclude as well that, according to Ashdown and Holbrooke, BiH has not any internal drivers of progress, at least not any that are worthy of explicit mention. This can also be interpreted as the view that, as explained in Chapter 7, to the US, BiH is not at all important when viewed as an independent, or separate, country; its only importance is in its employability by the US as a space, or reason, of intervention, or as an opportunity to present a story/narrative about the US as a ‘moral force’ engaged, among many other actions, in the

6 European Union Force Bosnia and Herzegovina, Operation Althea, which in 2004 replaced the NATO SFOR (or, Stabilization Force) as the force supervising the military implementation of the Dayton Agreement.

business of saving the ‘Bosnian Muslims.’ Additionally, it is clear that such a reduction of the ‘drivers of progress’ to the two aforementioned also implies the unimportance of the Dayton Constitution that, ideally, should have been read in the spirit of constitutional fidelity and continuously affirmed and reaffirmed as a driver, or a foundation, of progress in BiH.

Therefore, summarily, there is a core to the Dayton agreement, as a compromise, that the US, the UK, and the High Representatives have jointly undermined, but not fully degraded or given up; and they undermined it to preserve BiH in the state of political war. In previous chapters I do not address in more detail two thought-provoking issues on which I will briefly comment only at the very end of this conclusion: the issue of the actual motivation driving the international actors; and the issue of the ways, and probabilities, of improvement of the conditions, especially given the policy of internal BiH actors. Prior to that, here I add two further illustrations that are of key importance to my overall argument.

First, in late 2016, on the 21st anniversary of the signing ceremony of the Dayton agreement, High Representative Inzko made a bold attempt to refute the thesis that the ‘original meaning of the Dayton agreement’ was a viable and sensible notion (Inzko 2016). The thesis that is also advocated in this book. Of course, submitting a refutation of the kind through a 1,000-word-long op-ed is impossible; and an even longer essay is very likely to fail in this regard. This is due to the fact that, obviously, one can recognize something that can be characterized as the ‘original meaning/sense of the Dayton treaty’ in which the treaty was adopted—it is the sense that drove the warring parties to cease armed hostilities and put their signature to the document. Additionally, it is the sense that prevailed by the time of the High Representative’s assumption of *ad libitum*, or *ultra vires*, powers, that is, late 1997.

Contrary to such a view, Inzko in his op-ed claims that all the actions taken by the post-Dayton-period High Representatives should as well be subsumed under the category of the ‘original meaning of

Dayton' due to the two premises: first, the procedure of the expansion of the state powers allows for two possibilities: to transfer the powers from the entity level through an explicit decision by the entities; or, as Inzko claims, for the state itself to expand its powers based on the Dayton Constitution provision (Article III 5.a) concerning the possibility of assumption of additional powers (to protect, for instance, Bosnia's 'international personality').

However, in the op-ed Inzko does not pose the following question (and, consequently, does not attempt an answer): How can it be that the state of BiH of its own expands its own powers?⁷ The state in question is federal one, hence, the central level of government is a matter of an agreement between the lower levels; furthermore, the very representation at the central level is elected directly from the entities, that is, the lower levels or the federal units of the state. Hence, either Inzko's reasoning is flawed, or we need to accept his thesis that '*L'État, c'est moi*,' or 'The state equals the High Representative.' However, if that is the case, then it follows that BiH, in a constitutional sense, is envisaged as a quasi-monarchy or a straightforward dictatorship. This, of course, is an absurd consequence; hence, Inzko's thesis is implausible.

In the second part of the op-ed Inzko continues with his 'argument,' but the matters become increasingly entangled, murky, and illogical. First, Inzko, as a true dictator, claims that all those who oppose his own views are a retrograde factor to BiH; he claims that, due to their opposition, 'BiH is held hostage by these divisive, backward-looking discussions.'⁸ Second, Inzko now explicitly states that he has been the ultimate interpreter of the Dayton agreement (including all annexes, according to him), and this is indeed the thesis that divides two kinds of the Dayton meaning: according to

7 One should immediately recognize that, with such a notion, Inzko in fact sides directly with the Bosniak-Muslim elite perspective on the Dayton constitutional interpretation as it is, for instance, advocated by Kasim Trnka in his polemic with Kunić, on which see more in the opening lines of the second part of Chapter 3.

8 This kind of argument was typical in the era of communist rule in Bosnia and the socialist-Titoist Yugoslavia.

the first, rational one, BiH is a democracy in which a High Representative is supposed only to assist and facilitate the process; according to the second, irrational one, BiH is not a democracy, but is ruled directly by the international community through the institution of the High Representative who, in relation to the entire Bosnian population, acts as a dictator in the classical sense. As the latter thesis lacks the anchorage in the explicit text of the agreement, as explicated in Chapter 6 of this book, I here must conclude that Inzko, as one of the advocates of the anchorage-lacking thesis, presents a flawed and, ultimately, harmful argument. Contrary to his view, the notion of the original Dayton meaning makes sense, and it is a sense on which the local peoples, as the only sovereign parties to BiH, agreed in 1995 and are supposed to continue to agree also in the future, without the international, and conflict-aggravating, influence.

Third, and again symptomatically, Inzko is explicit enough when it comes to naming the culprit: the Bosniak-Muslim side is fully innocent and/or unproblematic, whereas the Bosnian Serbs and Croats are qualified as the ‘trouble-making parties,’ in this context as those parties who insist on the notion of the ‘original meaning of the Dayton treaty’—as different from the meaning that the High Representatives imposed, or perhaps tried to impose. Inzko thus joins the series of High Representatives, and international actors, who, by staging and stimulating the divide between the problematic and the unproblematic popular representatives in Bosnia, make their own contribution to a continuation of the Bosnian War by other means, as emphasized also in Chapters 7.4 and 8.3.

In the long run I am nearly certain that everyone, including the major actors of the international community, will find the imposition of ‘nonoriginal’ meanings of the Dayton treaty as in some sense lacking, problematic, and disruptive. Some, like Inzko, believe that this is exactly the reason why they need to continue defending staunchly all the interventions by all High Representatives. For instance, Woelk (2016) qualifies those interventions, including primar-

ily the imposed amendments to the Dayton Constitution, with a seemingly innocent term of ‘corrections,’ and expresses the hope that, following the period of correcting, the local parties will freely—but, according to Woelk (2011; 2016), in this part, too, the international community should play an important role—transform BiH into a form compatible with the EU criteria, without pondering over the fact that, for instance, BiH Croats, as a Bosnian constituent people, were modified into a ‘constituent minority’ of the Federation by Petritsch’s 2002 amendments. However, some actors have some interesting opinions that are both more intriguing and more cunning than the aforementioned ones.

As an example, in a 2006 article Wolfgang Petritsch does not hesitate to offer the thesis that the international community could, and should, be permanently engaged in Bosnia (Petritsch 2006). He looks forward to a situation when a local actor identifies some issues, or flaws, in the arrangements imposed by the international supervisors of Bosnia. In such a case Petritsch thinks that the international community would not act wisely if it declined the request by the local actor at least to help in removing the said flaw. In other words, in a pretty Machiavellian fashion, Petritsch considers the problems that the international community creates ‘today’ as a welcome opportunity for ‘tomorrow.’ Of course, nothing should prevent us from considering the case in which the amendments of tomorrow turn out to be as well problematic ‘a day after tomorrow,’ which altogether points to the possibility of a never-ending international mission, and supervision, in Bosnia.⁹

Contrary to such predictions, what if the local decision-makers, in accordance with the key argument of this book, realized that

9 This is how Petritsch (2006, 7-8) put it: ‘Let’s say the International Community set up an institution, or decreed a law, or interfered in a particular policy area,... so years later, a specific problem arises as a result of such previous intervention, and we—the International Community—say to the domestic stakeholders: “This is now your problem, you go and deal with it.”... This in my view is a “reverse ownership”—and it is not a good result of our intervention ... so the lesson learnt from these examples is that the art of interference is to find a balance between reverse ownership and dependency.’

the international community actually helped to generate further issues, and conflict, in Bosnia by imposing the forever problematic arrangements that have not been sanctioned by the explicit wording of the Dayton Constitution, and peace treaty in totality, as deliberately adopted by the three key parties to (and states surrounding) BiH? Before I bring this conclusion to a close by a brief and tentative answer to the question, I will now address the issue of the real motivation of the international actors, and emphasize three aspects that pertain primarily to Part II of the book, including the American narrative of BiH that is here of pivotal importance, as follows:

1. I do not think that it would be fair to read Part II as entailing the view that the US foreign policy makers to BiH are 'emotionally attached' to the Bosniak-Muslim element, or that the political interests of the former coincide with the interests of the Bosniak-Muslim elite. My guess is, actually, that the key American strategy amounts to '*divide ut imperes*' (divide in order to rule). As a part of this strategy, all the local parties are, to a higher or lower degree, instrumentalized by the international community. Hence, every local party should relate to the factor of instrumentalization as a major issue, but some obviously do not relate so as, in their mind, time works to their advantage despite the instrumentalization factor.

2. The strategy of '*divide ut imperes*' is always contextual and inevitably short-term oriented. This is why, within the American foreign political discourse as put in Chapter 7, the major part is played by the first narrative element that situates BiH in a wider frame—for instance, as a part of the story about 'the problematic character of Europe' that inherently calls for American help and/or the Transatlantic, i.e., NATO, framework. Recently, the first narrative element increasingly addresses the issue of the Russian factor that is cast in the vocabulary of the 'second

Cold War.’¹⁰ The consequences are nonetheless highly similar: again, America is likely to have to intervene to protect an ‘incapable Europe’ (from the Russian threat). And again, this kind of narrative should not be interpreted as an ‘account of reality,’ but, probably, as a highly pragmatic justification of a complex set of policies involving primarily military planning and exercises.

Hence, as emphasized in the concluding section of Chapter 8 as well, the US has the need to place ‘small Bosnia’ within a larger, ideally a global, context; moreover the US exploits the ‘Gestalt effect’—the image of Bosnia as an inverted triangle surrounded fully by the neighboring countries that turn the problem of Bosnia nearly automatically into, at least, regional one. As part of such contexts, Bosnia-Herzegovina makes some sense to the US and, as part of the same context, one can also, to some degree, make sense of the American perspective on the Dayton peace implementation.

Besides, the ‘*divide ut imperes*’ strategy depends on a cold and calculated reason that is essentially Machiavellian and, as such, divorced from the ethical values; the kind of reason that can enable the relations to be preserved in the condition of ‘a heightened temperature,’ but without crossing the dangerous threshold of escalation. This is why, probably, to the international actors the presence of a military force is as important as their ‘heating’ of the Bosnian pot. Summarily, this all means that, from the viewpoint of the strategy itself, one needs to lend a temporary support to a local party in Bosnia for the purpose of creating both imbalance and the impression that the other parties are unduly, unjustly or unfavorably, treated. However, one must not keep supporting the same party to the point where the other parties will become fully estranged and mo-

10 Expectedly, one layer of the Bosniak-Muslim political elite supports such narrative element as it, in their eyes, increases the Bosniak-Muslim value on the global market of politics in the sense of endowing them with the status of an American ally, despite the conflict-aggravating character of such a narrative. For a recent example, see Maza (2018), which reproduces and summarizes the key points of Bajrović, Kraemer and Suljagić (2018).

tivated to 'jump out of the pot,' rejecting any degree of cooperation within the given institutional framework.

Now, according to some serious evaluations—that can be traced back to an intelligent CIA assessment from 1984—one of the reasons why the Serb entity in BiH was internationally recognized in 1995 was in the American recognition of the danger the Islamic extremism could pose in BiH to the Serb community (Hećimović 2006, 50). A similar reason is often quoted in support of the fact that the international community generally tends to dismiss those solutions of the BiH problem that involve a creation of an independent, or semi-independent, Bosniak-Muslim statelet, which, given its past experience with the neighboring peoples, could produce and export Islamic radicalism. Finally, when hard pressed, Americans always go back to the four fundamental principles of the Dayton compromise:

- A single state composed of two entities
- Three constituent peoples
- Preservation of the international border and personality of BiH
- Special parallel relations between the entities and the neighboring states

Of course, from time to time we also witness some strongly worded critiques of the Bosniak-Muslim element by the US policy makers, indicating strongly that the policies or interests of the two are not fully convergent. For instance, in terms of the very process of negotiating at Dayton, Holbrooke's book of memoirs hands in to the Bosniak-Muslim representatives a portion of critique much larger than the portion given to either Croatian, and Croat, or Serbian representatives, including both Milošević and Tuđman personally. To both American and European diplomats and mediators, the disarray within the Bosniak-Muslim negotiating team was completely unacceptable and impossible to understand. The Bosniak-Muslim delegation behaved as if the 'Basic Principles' signed in September 1995 at Gene-

va and New York (Basic Principles 1995), as a foundation for the Dayton compromise, were neither signed nor binding on them.

To return to the aforementioned article Ashdown and Holbrooke authored in 2008: despite their assault on Dodik, the Serbs, and the Russian Federation, the two address in very critical terms the policy of Haris Silajdžić which, by aiming at the elimination of entities, involves a violation of Dayton's 'basic principle: a federal system within a single state.' Or, to revisit the issue: in the aforementioned 2005 article Holbrooke writes about the roots of al Qaeda in Bosnia, and it is clear that those roots must be tied to the Bosniak-Muslim element of BiH.

Perhaps more importantly, the American pragmatic-functional, and fundamentally constructivist-contractualist-federalist, attitude to the fundamentals of statehood is irreconcilable with the Bosniak-Muslim perspective on BiH as 'a primordial nation-state of Bosnians established centuries ago.' In his aforementioned essay on the Dayton Constitution, James O'Brien (2010, 340) states that the transfer of powers to the central level is not a ratchet. According to him, the powers can also be taken away and assigned to the lower levels of government, including primarily entities (or, cantons in the BiH Federation). Bosniak-Muslim representatives, and also, as demonstrated above, High Representative Inzko will certainly disagree with O'Brien. However, my point here is very clear: the convergence of interests, or political interests, between the US and the Bosniak-Muslim political elite in the post-Dayton period is neither absolute nor unconditional.

I will here offer another example; recently David B. Kanin (2017) has published a vocal critique of Bakir Izetbegović's decision to appeal against the 2007 International Court of Justice decision of Serbia's acquittal regarding the 1995 Srebrenica genocide, and do so in his role of a 'Bosniak representative,' not as a BiH Presidency member. Kanin's conclusion reads as follows:

Whatever the case, this incident proves that, no matter how often Bosnia's fragmented actors have demonstrated that the

Dayton construction does not and will not work, there always is room for new insults clearly aimed at communities as a whole, not just individual perpetrators of this or that outrage. In addition, the effort by the Big Man at the head of Bosnia's main Bosniak political party/patronage network to rip off this scab underscores the basic condition within which the artificial Bosnia operates; no matter the level or substance of differences between Bosnia's Serbs and Croats, those communities each have more problems with Bosnia's Bosniak plurality than with each other. Izetbegović's unilateral move not only is a boost to Bosnian Serb secession, it also justifies the Croats' demand for their own entity. This supposedly legal appeal reinforces the fact that there is no civic Bosnia, no functioning Bosnian state, and no basis for intercommunal trust or law-based society.

3. Hence, putting it in as fair terms as possible, and taking into account the conclusions drawn in Chapter 7 of this book, one must conclude that the US view of the Bosniak-Muslim element in BiH, and also their view of the other Bosnian communities, is ambivalent and heavily dependent on a current global need, and thus also highly pragmatic and relative.¹¹ Evidently, this cannot have a pos-

11 This is also related to the ambivalence in the Bosniak-Muslim (elite) own narrative concerning the Bosniak-Muslim identity itself, as intelligently put by Lučić (2006, 110): regarding the inside, in relation to the other two Bosnian communities, the narrative endlessly repeats the point on the Bosniak-Muslim superiority that is historical and moral, but also, and primarily, religious; regarding the outside, in relation to foreign countries and representatives, the narrative endlessly repeats the claim of victimhood—the Bosniak-Muslims are pictured as victims of a dual aggression from both Croats and Serbs that, at that point in time, threatened the bare existence of the community. Such a narrative was presented recently by Bakir Izetbegović (2013) in a lecture he delivered at the Oxford Islamic Studies Centre (see critiques in Hronešova 2013 and Kecmanović 2017a, 276–278). However, here I must note that such ambivalence is tailor-made for the American foreign political narrative on BiH. While, on the one hand, America views its actions in BiH as that of a 'savior of an innocent Muslim victim,' on the other, it also profits considerably from the narrative aspect of (alleged) 'religious/moral superiority' of Bosniak-Muslims—an aspect that causes a continuous alienation of the other two Bosnian communities and, within BiH, keeps regenerating the condition of conflict that then leads to polarization internationally as well. Such alienation and conflict is, finally, taken by the US as proof of the need for international intervention and supervision in the sense of the thesis that 'the Bosnian/Balkan peoples are naturally self-destructive and unfit to govern themselves,' as analyzed in Chapter 7.2.

itive impact on the relations within BiH, or even internationally. Hence, I think that the key problem of the American attitude to BiH is in the fact that the US has not yet unequivocally and honestly recognized the *de iure* constituent peoples of BiH as also *de facto* constituent to the state. It is true Republika Srpska was recognized, but there is something obviously missing in the recognition on the part of the US (recall Holbrooke's claim that 'to name one entity in Bosnia with a mono-ethnic name was a flaw,' which was oft-repeated especially in the period between 1998 and 2002, which is indeed the period of the most aggressive international action toward the revision of the Dayton Constitution). Of course, BiH as a single state was, and remains, recognized, but what kind of recognition do we deal here when, in terms of its foreign policy, BiH does not act yet as a single actor, or when it continues to be supervised, and quasi-guarded, by the institution of the High Representative whose comparability with Tito springs to mind quite spontaneously?

Moreover, how can one here refer to constituent peoples when, for the purposes of political representation, the election law treats entities as 'ethnically unmarked' units, in accordance with the U 5/98-III ruling of the BiH Constitutional Court? Hence, to round matters up, it seems that the American foreign political discourse opens an equal room to a 'BiH as a problem' and to a 'BiH with a solution,' but it also seems that the US can accept the latter only if the US itself is a major part of the solution; or, more precisely, if BiH as a whole needs the US as a mediating and pacifying force due to the inherently problematic character of BiH itself as a 'dysfunctional black hole that must not be left to itself,' as Lord Ashdown picturesquely put it.

At the very end we arrive at one last issue: How to make sense of the behavior, and positions, of the local actors? In particular, how should we explain the fact that, to the fact of a considerable revision of the Dayton compromise, the parties disadvantaged by the process (here I mean primarily the Bosnian Croats and Serbs as constituent peoples) have not responded more resolutely or more

dramatically?¹² Also, if the local players had been treated by the international actors as mere instruments, why was the fact not registered and taken as a sufficient reason to step outside the Dayton framework and perhaps initiate some negotiations aiming at a peaceful dissolution of the state, or at a new, fully confederated arrangement for BiH, or similar?¹³

I believe that the lack of a more resolute or energetic protest movement in BiH¹⁴ is due to three basic facts: first, the key local actors are divided over the issue of the ultimate goals, and therefore cannot even start envisaging a joint political or social action. More specifically, the Bosniak-Muslim political elite responds to the fact of appropriation of Bosnian sovereignty by the High Representative, as a voice of the quasi-international community and rule, by considering such appropriation as a temporary measure, or a condition, justified in terms of a provisional sacrifice that needs to be tolerated for the sake of a better future—a fully sovereign and undivided BiH, without entities and without the triad of peoples; and their view of the ‘*divide ut imperes*’ strategy is very likely to be the same. Of course, the Bosniak-Muslim political elite’s story reads now as a fairy-tale, but this suffices to prevent the processes of a (more comprehensive) change in BiH. The Croat and Serb representatives can make an attempt to persuade and alter the minds of their Bosniak-Muslim counterparts (see Kecmanović 2017a, 399), but I think that the attempt will continue to be proved futile in a foreseeable future.

Second, there is a problem with both Bosnian Croat and Serb elites in BiH in the sense that they view the revision of Dayton by the ‘international community’ as still tolerable and not sufficiently dramatic to justify a more determined attempt at the overturn of the system through, for instance, a blockage of the institutions or

12 The Croat self-rule movement in 2001 proved to be poorly organized and amateurishly executed.

13 See also the options in Kecmanović (2012).

14 My assessment of the February 2014 protests in Bosniak-Muslim parts of Bosnia was unambiguously negative, for which see Pehar (2014b).

of the political processes necessary to the regular functioning of the institutions (e.g., elections). In other words, as an example, in Republika Srpska the amendments imposed by Petritsch or Ashdown are not viewed as a sufficiently strong reason to organize the withdrawal of the Bosnian Serb representatives from the central BiH institutions, not to mention the more dramatic possibilities of protest. Of course, in RS you will hear a lot of talk about the principled illegitimacy of the international post-Dayton interventions, or about the need to recover the state of the original Dayton compromise, but such verbal protests are the only thing you can hear.

Third, one should not forget that the international representatives and diplomats continue to steer actively BiH-related developments, and this includes an active prevention of the protests, or actions, that could target the constitutional amendments the 'international community' imposed in BiH. In other words, any kind of a viable political protest, such as a boycott of the central institutions of the state, depends on the ability of a larger group of people to form a consensus concerning some course of action. Thus far, the international actors were very successful in producing the intra-group divides and disagreements that arrest the potential for change: today this is, I believe, quite obvious in RS and also, to an extent, across both Bosniak-Muslim and Croat ethnic communities.

A few years ago, one former official of the HDZ (Hrvatska demokratska zajednica, or Croat Democratic Union), a leading Croat party in BiH, told me that, in 2001, he received the following threat from a high-ranked American diplomat: 'We will buy some of you, and some of you we will send to the Hague; some of you will be turned against each other by an argument, and some will be sued for a criminal activity.' In other words, a local representative, who is assumed to ponder the best ways of protection of collective interests and the general welfare of the people who have elected him, is warned by a foreign actor that the former should be loyal, and obedient, to the international rulers of Bosnia, not to his electorate. Such a warning, of course, implies a demand to practice political de-

ception and dishonesty, which can bring no good to anyone including the local Croat party members.

In summary, then, I do not expect some deeper change in BiH any time soon, especially not of the kind initiated by the local actors. The future of the state is likely to be determined by the impersonal factors of 'hard power,' e.g., finance, climate change, the migratory trends, the mortality rate, or the more enduring alterations at the global political level. I see no potential for a diplomatic breakthrough or a negotiated solution (neither regionally nor within the EU), nor for some more dramatic internal protest. Of course, a short-lived violent confrontation or organized violence, including the use of the armed forces, is always a possibility in BiH. Regardless of all such possibilities, the key message of this book reads that, to us, the BiH citizens, the worst possible thing has been already happening for more than two decades—under the discursive-political criteria of the ability to seek a compromise through an argument and a reasonable common discourse, or to transform peacefully a shared institutional frame, in BiH we vegetate in a political condition that *de facto* amounts to the 'state of war.'¹⁵ Therefore, ours is a (paradoxical or impossible) state of 'peace as war.' To make the tragedy even more tragic, but not from everyone's perspective: to some international actors whose career, as Vulliamy (2005) bluntly put it, is in the 'fixing of the international crises [(!)]', such a state presents but a welcome business opportunity.

15 Looking back at considerations in Chapter 6.4, I never implied that I believe that the relations will develop or evolve in a more positive direction of the High Representative being actually stripped of his dictatorial powers, or the local parties recovering the state of 'the original Dayton treaty.' Such political developments are indeed part of my preferences, but I deem them highly unlikely.

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